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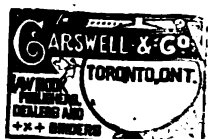
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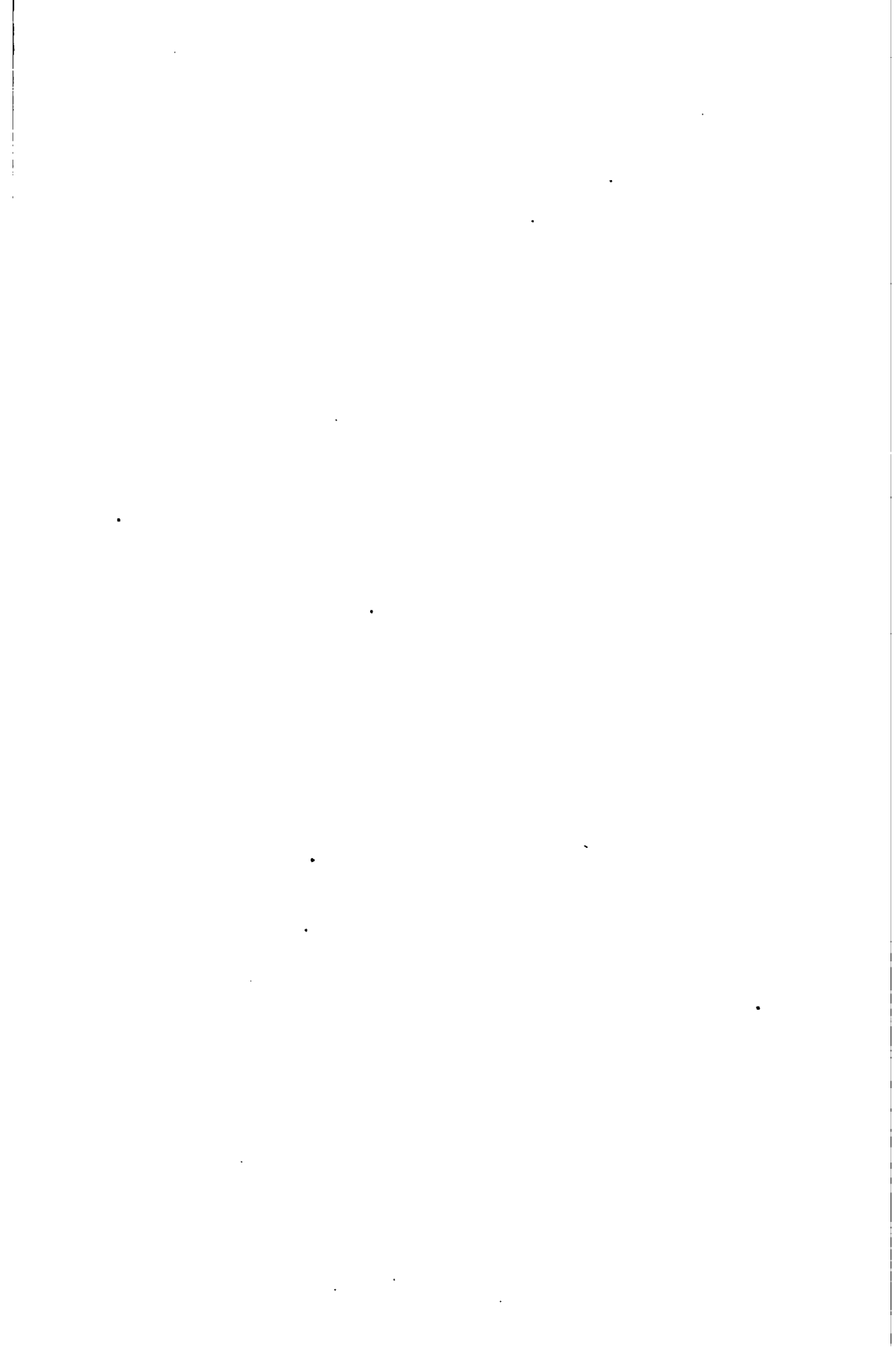
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BY

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TABLE OF CASES

REPORTED, NOTED, AND DIGESTED

IN VOL. VII.

Abbott es qual. & McGibbon.....	179	Boisseau et al. & Thibaudeau et al.....	274
Abbott, Ex parte.....	318	Bolt & Iron Co. of Toronto v. Gougeon..	40
Acer & The Exchange Bank of Canada...	346	Boundary Case.....	281, 313, 341
Adams v. Coleridge.....	401	Bourgeois v. Piedalue.....	391
Allen et al. v. The Corporation of Rich- mond.....	63	Bourgoin et al. v. Malhiot et al.....	286
Amesse v. Latreille.....	326	Bowker Fertilizer Co. v. Cameron.....	214, 217
Anderson v. The Grand Trunk Railway Co.....	150	Bourguinon v. Archambault.....	415
Armstrong et vir v. La Société de Con- struction Metropolitaine.....	51	Brill v. The Singer Manufg Co.....	380
		Brooks v. Hassall.....	136
		Brown v. Collins.....	72
		Brown v. Demers, and Demers, Petr.....	312
		Brown et al. v. Gordon.....	354
		Burnett v. Pomeroy et al.....	110
		Burnstein v. Davis.....	378
		Burroughs v. Merriman.....	299
		Bury v. Silberstein.....	42
Badenach v. Slater.....	392		
Baker & Lebeau.....	299	Caldwell & Maclaren.....	195, 203
Bank of B. N. A. v. Whelan.....	311	Campbell es qual. v. Judah.....	147
Banque d'Hochelaga v. Masson, and Fair es qual.....	359	Carmel v. Asselin et al.....	150
Banque Jacques Cartier v. Neveux.....	338	Cayionnette v. Girard.....	383
Banque Jacques Cartier v. Pinsonneault et al.....	359	Charbonneau v. Charbonneau.....	96
Banque Nationale v. Joly.....	214	Chinic et al. & Garneau.....	210
Basin v. Lacouture.....	68	Cholette & Bain.....	220
Baxter v. Martin et al.....	78	Choquette & Hébert.....	178
Baxter v. Union Bank of Lower Canada	61	Christin v. Hudon et al.....	338
Beatty v. Glenister.....	349	Cité de Montréal v. Wylie et vir.....	26
Bellhouse v. Laviolette.....	84	Clendinneng v. Euard.....	43
Belmont Manufacturing Co. v. Arless....	50	Cockayne, In re.....	297
Belt v. Lawes.....	180	Colonial Building & Investment Associa- tion & Loranger, Atty. Gen.....	10
Bergeron v. Roy.....	414	Commercial National Bank v. Henninger.	388
Bernard v. Brillon.....	414	Commonwealth v. Springer.....	1
Berthier Election Case.....	152	Cooke et al. v. Penfold.....	176
Bissonnet v. Guerin.....	368		
Bloom's Case.....	247		
Board of Works, etc, v. United Telephone Co.....	363		

Corporation de la Paroisse de la Pointe aux Trembles v. La Corporation du comté d'Hochelaga.....	158	Edson, Ex parte.....	68
Corporation du Comté de St. Jean v. Corporation de la paroisse de Laprairie.....	327	Eno, Ex parte.....	226, 360
Corporation du Village du Bassin de Chambly & Scheffer.....	390	Euston v. Euston.....	145
Corporation de St. Maurice v. Dufresne.....	401	Exchange Bank of Canada, In re.....	389
Corporation du Sacré Coeur & Corporation de Rimouski.....	407	Exchange Bank of Canada v. Craig et ux..	390
Corrigan v. The Grand Trunk Railway Co.....	355	Filiatrault v. Elle.....	378
Cournoyer-Paulet et al. & Guevremont.....	308	Finney v. Cairns.....	389
Coutu v. Lefebvre.....	111	Frechette & La Compagnie Manufacturière de St. Hyacinthe.....	34
Cowley, In re.....	225		
Cox and Bailton, R. v.....	319	Gailloux et al. & Bureau.....	90, 99
		Gaudin & Ethier.....	382
Daoust, Ex parte.....	69	Gauthier v. St. Pierre.....	41, 44
Decary v. Mousseau.....	359	Généreux v. Cuthbert.....	152
Delisle, Ex parte.....	120	Gerbie v. Bessette et al.....	156
Deming v. Norfolk & W. R. Co.....	356	Gilman v. Robertson et al.....	60, 353
Denault v. Banville.....	149	Gilman v. Royal Canadian Insurance Co..	354
Denault et vir v. Pratt.....	415	Ginger v. Beale.....	273
Dery et al. & Hamel.....	405	Giroux v. Normandin.....	277
De Sola et al. v. Stephens.....	172	Goldie et al. v. Bisailon.....	347
Desrosiers v. Lessard.....	69, 303	Grange & McLennan.....	407
Dillon & Beard.....	103	Granger, Reg. v.....	247
Dixon et al. v. Etu.....	213	Gravel v. Hughes es qual.....	32
Dodd v. Jones.....	355	Gurney v. Bradlaugh.....	98
Doranes qual. v. McNally et al.....	360		
Dorion v. Diette, & Diette, opposant.....	266	Halcrow v. Lemesurier.....	401
Dorion & Dorion.....	90, 397	Harrington et al. & Corse.....	408
D'Orsonnens v. Christin.....	338	Harris v. Cumyns.....	232
Doutre & The Queen.....	225, 241, 242, 265, 270, 287, 298	Hathaway v. State Ins. Co.....	388
Drennen v. London Assurance Corp'n.....	412	Hatton v. The Montreal, Portland & Boston Railway Co., et al.....	368
Dubuc v. La Compagnie du Chemin de Fer de Montréal & Sorel et al.....	5	Hayes v. New York Central R. Co.....	410
Dubuque v. Dubuque.....	32	Hill v. Hart-Davis.....	373
Ducondu & Dupuis.....	46	Hodge & The Queen.....	18, 25, 49, 121, 169, 177
Dumas v. Jacquet.....	274	Hodgson v. La Banque d'Hochelaga et al.	353
Dupuis v. Bouvier.....	92	Hogan & City of Montreal.....	378
Durocher v. Sarault.....	96, 102	Hoosac Co. v. O'Brien.....	306
Dussault et al. v. Belleau.....	401	Hôpital Général v. Gingras.....	401
Duverdy v. Zola.....	274	Hughes et al. v. Cassils et al.....	367
		Hughes v. Percival.....	16
Eaton v. Unwin et al.....	3, 7		
Ecclesiastiques (Les) du Séminaire de St. Sulpice de Montréal & La Société de Construction Canadienne de Montréal.....	131	Ins. Co. v. Garland.....	380
		Irwin v. Williar.....	153
		Johnson v. Commonwealth.....	356
		Jones v. Albert, & Bertrand.....	277

TABLE OF CASES.

v.

Joyce v. The City of Montreal	260, 263	Martin v. Dansereau.....	109
Joubert es qual. v. Walsh.....	134	Martin v. Labelle.....	174
		Martin v. The Corporation of the County of Argenteuil	139
Kavanagh, Ex parte	316	Massicotte v. Berger et al.....	360
Kennedy v. Brown.....	396	Maurice v. Desrosiers	264, 361
Kennedy v. O'Meara	407	Menard v. Lussier et al.....	59
King v. Watson	396	Menard v. Pelletier.....	15
Kingston v. Corbeil	325	Merchants Marine Ins. Co. & Ross	401
Kohn v. Koehler.....	305	Méthot v. Jacques	384
		Mignonette Case.....	321, 375, 381, 388
Labelle v. Limoges.....	294	Milliken v. Western Union Telegraph Co.	412
Lachapelle v. Larose.....	353	Moffatt & Burland	182
Lambe es qual. v. The North British & Mercantile F. & L. Co.....	171	Molson & Carter	292
Lambert v. The Grand Trunk Railway Co.	4	Monarque v. Clarke	361
Landreth v. Landreth	405	Mondelet et al. & Roy	352
Lang v. Guthrie	185	Montreal City Passenger Railway Co. & Parker	194
Lapointe v. The Canadian Pacific Ry. Co.	29	Montreal City Passenger Railway Co. & The Montreal Brewing Co	195
Larreau v. Dunn et al.....	218	Montross v. State	248
Laurin v. La Corporation de la Paroisse du Sault-au-Recollet.....	318	Morandat v. Varet	382
Lavoie v. Gaboury.....	186, 378	Mousseau Commission	251
Lebeau v. Turcot	257, 259	Muldoon et al. v. Dunne et al	239
Leclaire et al. v. Forest.....	383	Murphy v. Orr.....	348
Leete et al. v. The Pilgrim Congregational Society et al.....	342	Nadeau v. Cheval dit St. Jacques	114
Lefebvre, Ex parte	258	Nicols v. Pitman.....	304
Lefebvre & Hochelaga M. F. Ins. Co..	226	Noltage v. Jackson.....	112
Lemieux & La Corporation de St. Jean Chrysostome	406	Nunn, Ex parte.....	241
Leonard v. Bolfe et al	301		
Leriger dit Laplante v. Pinsonnault.....	311	O'Brien v. Ohio Insurance Co	380
Leslie v. Leslie.....	95	Orr-Ewing Case, The.....	105
Lewis et al. v. Primeau et al	39	Onimet v. Cadot.....	415
Loranger, Attorney-Gen'l & Reed	405	Onimet v. Gravel	383
Lord et al. & Dunkerly	102		
Lovejoy v. Campbell	397		
		Pauzé es qual. v. Sénécal	30
Major v. Paris ..	266	People v. Blake.....	356
McDonell et al. & Buntin	130	People v. Lyle.....	389
McFarlane v. McNeece	398	Perry, Ex parte.....	330, 413
McGibbon et al. v. Brand	228	Pillet, Ex parte.....	78
McLaren v. Caldwell.....	114, 195, 203	Pingault v. Symmes.....	3
McLean & Phillips et al	246	Pinsonnault & Hebert et al.....	276
Mara v. Cox et al	355	Poirier v. Monette	71
Marchand v. Snowdon et al.....	44	Pomeroy v. State	278
Marcile v. Mathieu.....	55	Porteous v. Meyers.....	355
Marois v. Deslauriers.....	278	Pratt & Berger.....	235
		Prentice & Macdougall	162
		Prosser et vir v. Creighton	104

Rae & La Compagnie du Chemin Macadamisé de Laprairie	307	Shaw v. Bateman	368
Rea v. Kerr	157	Sipling & Sparham Fireproof Roofing Co. .	390
Read v. Anderson	296	Soulanges Election case	220
Reed v. Reed	372	State v. Colgate	356
Reed & Sparham Fireproof Roofing Co. .	390	Stephen et al. v. The Montreal, Portland & Boston Railway Co.	62, 85
Regina v. Buntin	228, 395	Stephens v. The City of Montreal	114
“ v. Cox and Railton	319	Sundberg & Wilder	168
“ v. De Banks	409	Surprenant v. Gobeille	195
“ & Dautre	225, 241, 242, 265, 270, 287, 298	Symes et al. & Gingras	126
“ v. Granger	247		
“ & Hodge	18, 25, 121	Tansey & Bethune et al.	133
“ v. Hollis	136	Taylor v. Brown, & Audenreid, T. S.	62
“ v. Judah	371, 385, 396	Tedder v. Macleod	304
“ v. Maher	82	Texas & Pacific Railway Co. v. McDonnell.	356
“ v. Mallory	207	Thérour, père v. Greer	7
“ v. Moody	398	Thomas v. Coombe et vir	77
“ v. Price	161	Thouin v. Rossaine	287
“ v. Scott	322	Tupper v. McFadden	369
“ v. Wellard	408	Turcotte v. Brisette dit Courchene	277
Richer v. The City of Montreal	79	Turgeon v. La cité de Montréal	383
Rivet v. The City of Montreal	122		
Religieuses (Les) de l'Hotel Dieu v. Nelson	84	United States v. Bank of Montreal	267
Rolland v. Cassidy	70	Upmann v. Forester	72
Rose et al v. Tansey	250		
Ross v. Lefebvre	401	Valiquette, Ex parte	70
Ross et vir & Ross et vir	65		
Ross et vir v. Sweeney et al	346		
Russell & Lefrançois	57		
		Ward v. National Bank of New Zealand ..	136
St. Lawrence & Chicago Forwarding Co. & The Molsons Bank	367	Weinrobe v. Solomon	109
Ste. Marie v. Aitkin et vir	119	Weldon v. Winslow	153
Salvation Army, In re	413	White v. Whitehead et al	292
Sancer v. Girard	110	Wilder v. Sundberg	52
Sanders v. Teape & Swan	379	Williams v. Nicholas	75
Scott & The Quebec Bank	343	Williams v. Seale	224
Senécal v. Choquette	398	Woodley v. Michell	15
Senécal & Hatton	413, 414	Woodward v. The Corporation of Rich- mond	71

ERRATA.

- P. 60.—In foot note, “1883” should be “1884.”
P. 78.—Insert “*Before Torrance, J.*” over report of *Baxter v. Martin*.
P. 172.—In head note, for “claim” read “clause.”
P. 178.—Delete “Dorion, C. J.” in *Choquette & Hébert*.
P. 311.—Line 3, column 1, for “confirmed” read “reversed.”
P. 338.—Line 12, column 2, for “Com.” read “Law.”

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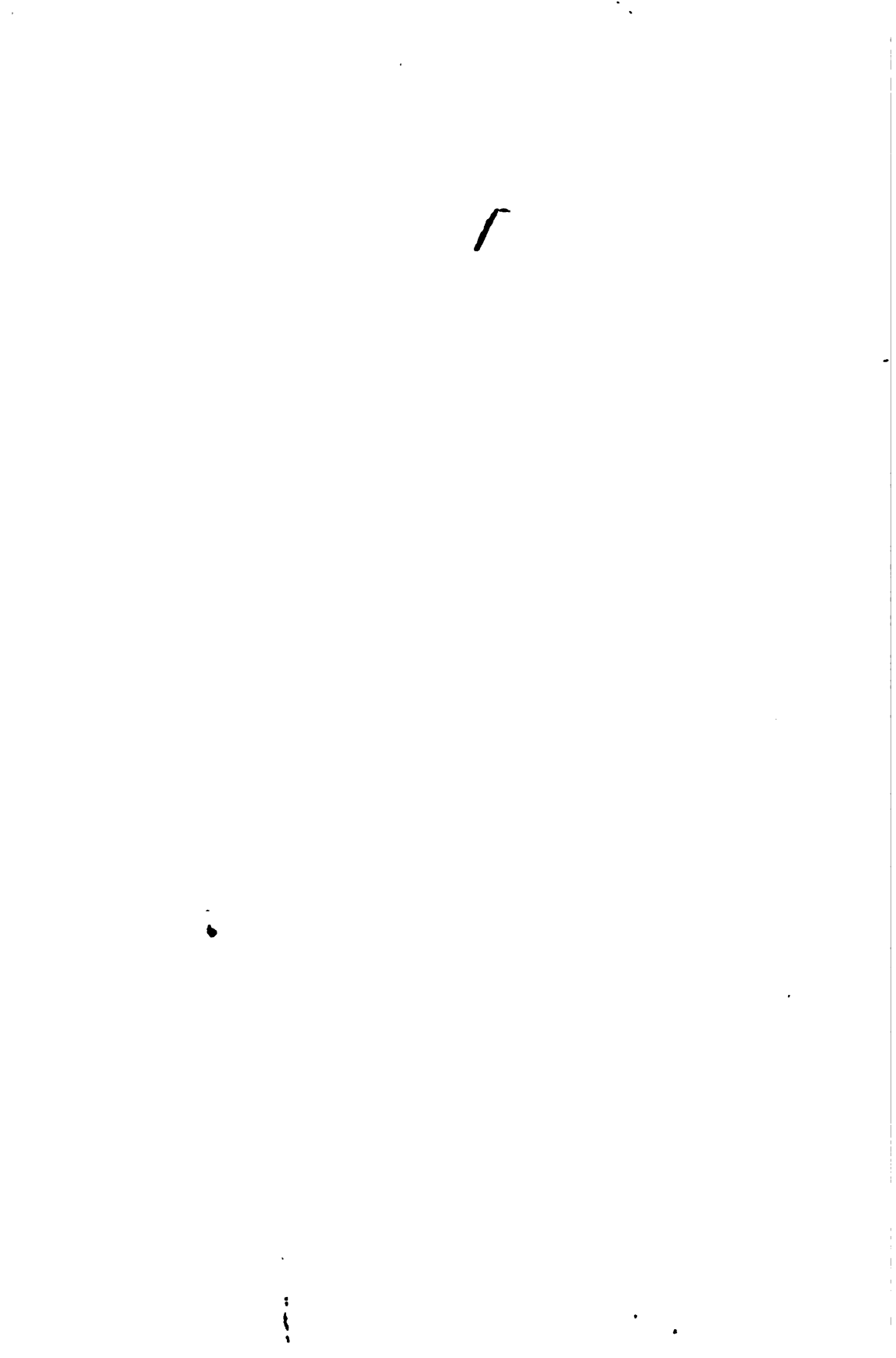
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The Legal News.

VOL. VII. JANUARY 5, 1884. No. 1.

HUSBAND AND WIFE.

The female spider, when her consort ceases to be agreeable to her in other ways, eats him. In human societies the process is sometimes reversed, either literally or figuratively according to the stage of civilization in which the event occurs. But wives are now obtaining greater privileges, and one of the consequences of the Married Women's Property Act in England has been a judicial decision, that a wife with a house of her own can turn her husband out of it and obtain the aid of the Court to keep him out. (See 6 L. N. 268). That case is now before the House of Lords. The same question has come up in Pennsylvania, in *Commonwealth v. Springer*, in which the sole question was, can a wife exclude her husband from the right to eat at her table, ride in her carriage, and sleep in her bed? The court said: "While the relation of husband and wife continues in its normal condition, and there is no rupture of those relations or separation between the parties, it is admitted the husband possesses all those privileges. However unwilling he may be to consent to such a summary divorce from his wife's bed and board, and the comforts of her society and enjoyment of her property, we can see no way to insure to him those rights and comforts by force. The right may exist, but the remedy is by making himself agreeable to her rather than by resorting to force and arms. He perhaps may use actual force as between him and her so long as he does not injure her person, destroy her property, or break the public peace. The latter is of paramount importance, and must be preserved regardless of the consequences to mere private rights. The difficulty here presented did not exist at common law; it has grown out of the Married Woman's Act. If she is strong enough to turn her husband out of her house, or after he has voluntarily left it, if she can successfully bar the doors against him so securely as to require actual

force and a breach of the public peace to effect an entrance, I am inclined to the opinion that his only remedy is to seek another home, invite her to share it with him, and upon refusal subject her to the pains and penalties of willful desertion. In such case he could either refuse to contribute to her support, and preserve his right of curtesy in her estate by denying her a lawful divorce, or if he desired it, he could successfully break the bonds of matrimony and seek a more congenial wife. In *Commonwealth v. McGolrick*, 1 Del. Co. Rep. 446, we held the husband to keep the peace in a somewhat similar case. To attempt to break into her house by force would result in forcible resistance by her, her friends, mercenaries and coadjutors. No personal valor of his could overcome such troops. This would require an accumulation of additional forces, munitions, and muniments of war upon his part, ending in riot and bloodshed requiring peradventure the interference of the militia, army and navy of the Commonwealth. The dreadful consequences of matrimonial infelicity to the old city of Troy admonish us to nip the germ of strife in the bud by holding the husband to keep the peace and be of good behavior."

The remedy pointed out by the Court in the remarks quoted above agrees with our law, the Code having enacted (Art. 175) that "a wife is obliged to live with her husband, and to follow him wherever he thinks fit to reside." It is only when she has obtained a separation from bed and board that she has "the right of choosing for herself a domicile other than that of her husband." (Art. 207).

THE N. Y. COURT OF APPEALS.

Evil days have come to the members of appellate courts. A voice is now heard, and lamentation, from the State of New York. The pet court, the unrivalled team, the champion seven, are vanquished. The *Albany Law Journal* says:—

"The Court of Appeals have failed to clear their calendar at the close of the year. The judges have labored with their accustomed devotion and fidelity, and have decided about the usual number of causes, say 530. But the appeals have increased, and there will be a remanet of probably 150, and these

with the new causes will probably swell the new calendar to 800 causes. This is a very serious event. This court has for twelve years been the only court in the United States that has kept up with its business. But at what a sacrifice of life and health! Judges Church, Peckham, Grover and Allen literally worked themselves to death, and other members of the court have seriously impaired their health in their hopeless undertaking."

A good many suggestions are made as to the mode in which relief is to be obtained. The one most favored seems to be the enlargement of the court so that all the judges need not sit at once, and in this way almost continuous sittings could be maintained.

PATENTS IN ENGLAND.

On the 1st of January a new patent act came into force in Great Britain, by which the system of obtaining patents is simplified, and a considerable reduction is effected in the cost. The expense of procuring a patent in England is now about the same as in the United States. Scotland, Ireland, Wales, and the Channel Islands are included in the protection. A valid patent cannot be obtained if the article to be patented has been introduced into the country, or copies of a United States patent have been open for general inspection in such a way that the public may be presumed to have knowledge of them, as in a reading room, library, etc., before application is made for the patent in England. Each application for a patent must be confined to one invention. No examination is made to determine ownership. The original declaration and provisional specification go to an examiner only to see that the invention is fairly described and correctly named. Patents are granted jointly to the inventor with others, but there must be a declaration from the inventor that he is the true and first inventor.

JUDICIAL INDEPENDENCE.

We can hardly credit a statement made by the *New York Evening Post*, and copied by the *Chicago Legal News*, that "a large proportion of the Judges hold railroad passes, and have asked for them, or have, in other

" words, incurred obligations to railroad companies which ought to disqualify them, but do not, for sitting on any railroad case, and which the law ought to make a punishable and disgraceful offence."

If there be any truth in this, it is not so surprising that the entertainers of a distinguished English Judge should have applied for railroad passes in Canada. Here the Judges leave that sort of thing to city aldermen.

A DIFFERENT PICTURE.

A keen and disinterested observer who has passed five years in Canada, and has spent a good portion of the time in visiting the different sections of the country—we refer to the Marquis of Lorne—gives a very different account of the Dominion from that which we extracted recently from the pages of our sadly befogged contemporary, the *American Law Review*. In his address at the Royal Colonial Institute in London, the Marquis foreshadowed the fast approaching change of Imperial and Colonial relations in these terms:—

"These islands have 35 millions of people. Canada has now 5,000,000. Australia will soon have 4,000,000. Britain has for the small area she possesses greater resources in coal and other wealth, but it may be well for her to remember how little of the earth's surface she possesses in comparison with her children. (Hear, hear.) The area of Canada and of the Australian States is so vast, the fertility of their soil is so remarkable, the healthfulness of their climate is so well proved, and the rapid increase of their white population is so certain, that within the lifetime of the children of gentlemen here present their numbers will equal our own. In another century they must be greatly superior to us in men and material of wealth. (Hear, hear.) How foolish, therefore, will our successors in England deem us to have been if we do not meet to the fullest degree possible the wishes of these growing States."

We trust our good neighbour of St. Louis will come and see for himself, and even if he chooses the week of our winter carnival for his visit, we doubt not that he will have reason to revise his estimate of us.

AN INTEREST PUZZLE.

A correspondent writing from the District of Bedford, sends a note of a case, *Eaton v. Unwin et al.*, which he states has engaged the attention of nearly the whole Bar of that district, "and is somewhat analogous to the celebrated 15 puzzle." The case evidently affords scope for some ingenuity in calculation. It would be interesting to have the precise words of the agreement.

THE BLACK CAP.

The origin of the black cap of our judges is involved in some obscurity. The "Athenian Oracle" describes black as the fittest emblem of the grief the mind is supposed to be clouded with upon occasions of outward mourning, and "as death is the privation of life, and black a privation of light, it is very probable this color has been chosen to denote sadness upon that account; and accordingly this color has for mourning been preferred by most people throughout Europe." The practice of the English Judges in putting on a black cap before they pronounce sentence of death upon a criminal is explained by some as having this general meaning of sorrow, with perhaps a remnant of ancient custom of covering the head as a token of grief. Thus "Haman hastened to his house, mourning, and having his head covered." (Esther vi. 12.) David, too, "wept as he went up, and had his head covered * * * and all the people that were with him covered every man his head, and they went up, weeping as they went up." (2 Samuel xv. 30.) Darius covered his head on hearing of the death of his queen, and Demosthenes when insulted by the populace did the same; while the mourners at ancient funerals drew their hoods over their heads. Hence, the black cap has a distinct symbolic meaning; the judge puts himself as it were into mourning for the person who becomes doomed at the act, as though he were already dead. This, though throwing considerable figurative signification around the act, scarcely explains how it became and continued so decided a feature of our legal procedure. Another explanation of the solemnity, if it does not contain the true origin of the custom, bears the impress of greater likelihood, the reasons

of adoption being more definite. In early times the judges were, for the most part, ecclesiastics, and in spite of the church's prohibition that no one in holy orders should pronounce sentence of death, they were, by virtue of their judicial office, often called upon to do so. Hence, the judge, when the sentence of death had to be passed, laid aside his clerical character, and putting on his cap to cover the clerical tonsure, thus showed that he acted now in a civil capacity alone. The greater number of clerical judges made the custom more universal, and we do not hesitate to accept this as the reason why the act is observed to this day.—*Hatters' Gazette*.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before JOHNSON, TORRANCE, & RAINVILLE, JJ.

PINGAULT V. SYMMES.

Action for assault and battery—Plea in bar—Conviction.

A conviction before justices for an assault and battery may be pleaded in bar to an action for the recovery of damages for the same assault.

The inscription was from a judgment of the Superior Court, Sherbrooke, Plamondon, J., 12th September, 1883.

JOHNSON, J. This was an action of damages for an assault and battery committed by the defendant upon the plaintiff at Sherbrooke. The defendant pleaded among other things, that there had been a complaint made against him before a justice of the peace for the offence, and he had been convicted and fined \$15, and costs, and had complied with the terms of the conviction. This plea was overruled by the Superior Court at Sherbrooke; and on the merits judgment was given against the defendant for \$50, and the costs of the action. The defendant now brings the case here, and contends that the legal effect of his conviction before the magistrate was to release him from all further or other proceedings, civil or criminal, for the same cause. The case of *Marchessault v. Gregoire*, decided in this Court on

the 31st May, 1873, and reported in the 4th Rev. Leg. p. 541, lays down the law applicable to this case, and shows the distinction between the effect of a conviction for an assault and battery, and that of a conviction for certain aggravated assaults causing grievous bodily harm, or unlawful and malicious cuttings, stabbings, or woundings. In the latter cases the release only extends to further criminal proceedings: in the former to both civil and criminal proceedings. It was, however, suggested for the plaintiff, that the plea in bar set up by the defendant in the court at Sherbrooke was founded upon the 43rd section of the 32nd and 33rd Vict. c. 2, which said that in case of convictions for assault and battery a certificate that the offender had satisfied the conviction should release him from all further proceedings, civil and criminal; and that the Canadian Parliament, though it could deal with criminal law, and release from further criminal proceedings, could not deal with our provincial civil law, nor consequently release from civil liability in our courts.

Without entering upon that argument now, it will be sufficient for the present case, to point out that the 32nd and 33rd Vict. in no way interfered with the civil rights of the inhabitants of this province, as they existed when it was passed, and had existed for twenty-seven years previously, for the 4th and 5th Vic., c. 27, sec. 28, reproduced in the Cons. Statutes, c. 91, sec. 44, had made precisely the same provision; therefore our civil rights were left by the 32nd and 33rd Vic. just where they had been before it was passed. Then, it was attempted to show that this case was not one of assault and battery merely; but the conviction shows it most clearly to have been that, and nothing else. The words are "did unlawfully assault, beat, wound, and ill-treat"—the words immemorably used to describe an assault and battery. In order to come under sec. 1, sub-sec. 4 of c. 105 of the Consol. Stat., the words required would have been "unlawfully and maliciously inflicting grievous bodily harm," or "unlawfully and maliciously stabbing, cutting, or wounding."

The plea in bar of the defendant, then, should have been allowed, and the judgment

of the Court below must be reversed with costs.

Judgment reversed.

Belanger & Co. for the plaintiff.

J. W. Merry for the defendant.

COURT OF REVIEW.

MONTREAL, December 29, 1883.

Before JOHNSON, DOHERTY & RAINVILLE, JJ.
LAMBERT v. THE GRAND TRUNK RAILWAY CO.
OF CANADA.

Railway Company—Negligence.

A horse was found dead near the railway track.

There was no evidence as to the immediate cause of death. It was proved that the fence adjoining the track, and the gate therein, were in good order, but that the gate was often left open by persons passing through it, not in the service of the railway company.

Held, that the company was not liable.

The inscription was from a judgment of the Superior Court, Montreal, Torrance, J., dismissing the action. See 6 Legal News, p. 43, for judgment below.

JOHNSON, J. The owner of a horse which met its death on the line of the railway, has assigned his claim for damages to the plaintiff, who alleges by his action, that the animal got on to the track by reason of the insufficiency of the gate and its fastenings, which he attributes to the negligence of the railway company.

The case must be looked at, first, with reference to the liability of the defendants, by reason of any want of observance on their part of their obligations respecting the gate; and, secondly, with reference to whether the horse, being once on the line of the defendants' railway, was killed in any manner for which they alone would be responsible. As to the first question the evidence of Alex. Denis shows that the gate and its fastenings were all right as far as the company's obligations went; and the same thing is distinctly proved by the evidence of Alexandre Boissy, and that of Jean M. Beauchamp. These two witnesses even go further, and say that Isaie Goyette, who may be considered the real plaintiff, distinctly stated shortly after the occurrence (at a time when he probably was not thinking about going to

law), that not only was the gate in a proper condition; but that he had found it open in the morning after the horse had got out; and Alexis Goyette, the uncle, says the same thing.

It would, therefore, appear useless to look at the question of what was the immediate cause of the animal's death. It would be absurd to hold anybody else responsible for an occurrence to which the negligence of the owner or those under his control had materially contributed by leaving the gate open. The rule in such cases is very plain, and we have frequently acted upon it. Even supposing that the horse being on the line, was killed by the defendants' engine in a manner to make them otherwise responsible, if the owner by his own fault contributed to the result the defendants would not be liable. In the case of *Ware v. Carsley* in this court, I cited the rule from Campbell's treatise on the law of negligence; and it is this:—In all "cases where ordinary negligence is sufficient to infer liability, it is a good defence "to show that there was contributory negligence on the part of the plaintiff; that is to "say, to show that although the negligence "of the defendant was a cause, and even the "primary cause of the occurrence, yet that "it would not have happened without a certain degree of blameable negligence on the "part of the other." The same thing was also decided in this court in the case of *Vallée v. The Montreal Gas Co.*, referring to the leading English case of *Tuff v. Warman*, 5th vol. Common Bench Reports, p. 573, where six judges held that, if by ordinary care the plaintiff might have avoided the consequences of the defendant's negligence, he is the author of his own wrong, and cannot recover. In the present case, however, we are not entirely relieved from considering the second part of the case, because there is another rule equally plain in respect to costs in such cases, which is that costs are to be divided, where there has been fault on both sides; but of course, if there has been no fault proved on the defendant's part, the plaintiff would entirely fail, and would have to bear the costs. Now we are left entirely to conjecture as to the immediate cause of this animal's death. It was found in the morning dead, or nearly so,

lying at the bottom of a culvert, with some marks on it, which might or might not have been made by contact with the engine or any part of train; or it might have been frightened by the approach of the train, and in its flight have fallen into the culvert. It is impossible to say with any certainty from the evidence what was the immediate cause of its destruction; but even if it had been hit by the train, the company would not necessarily be liable for running over anything on their track, (which is their own property for the purpose of running trains) if that thing had been put there on purpose, or, which is the same thing, had got there by the fault of the owner. I say the company would not be liable in such case unless by ordinary care they could have avoided the result. Now we have no reliable evidence whatever as to how the horse was struck, if even it was struck at all. Alexis Goyette the uncle, and young Alexis Goyette the brother of the owner, are the only witnesses who were on the spot soon after the accident, and neither of them actually witnessed it. The elder one says that in coming down from his house he heard the whistle of the engine, as if to frighten cattle off the track, and this is all we have. There is therefore no evidence at all of fault or negligence on the part of the defendants; but there is evidence that the plaintiff or the owner acted in direct violation of the law in allowing his horse to stray on the railway. So that this is not a case where, properly speaking, there is only contributory negligence on the part of the plaintiff; but it is a case where he alone is to blame, therefore the action fails, and he must bear the costs.

Judgment confirmed.

Prefontaine & Co. for the plaintiff.

G. Macrae, Q.C., for the defendant.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before JOHNSON, RAINVILLE & JETTE, JJ.

DUBUC v. LA COMPAGNIE DU CHEMIN DE FER DE MONTREAL & SOREL et al.

Mandamus—Railway Crossing.

A mandamus will not lie against a Railway Company, to compel the company to fulfil

a statutory obligation, such as the obligation to make and maintain crossings on the petitioner's property, under the Quebec Railway Act, there being the remedy by ordinary action.

The inscription was from a judgment of the Superior Court, at Sherbrooke, Doherty, J., 15th June, 1883, maintaining the demurrer to the action.

JOHNSON, J. The petitioner has inscribed this case for review from a judgment rendered in Montreal in June last, and which dismissed the petition upon the demurrers severally pleaded by the two defendants, one of them being the Montreal & Sorel R. R. Co., and the other the South Eastern Railway company. The object of the petition and the writ was to compel these companies to make and maintain crossings upon the petitioner's property under sec. 18 of the Consolidated Railway Act of the Province, 43 and 44 Vict.; and the petition also asked for damages for the neglect hitherto to make these crossings.

The demurrers were identical, and shortly stated, they contended that no mandamus in such a case as was alleged would lie under the article 1022 of the code of civil procedure. Of course, that article, in any of its sections, except the 4th, could have no application whatever to the present case. That section, however, says that the writ may be obtained in all cases where it would lie in England. Now it would not be a very easy nor a very profitable task to determine what are all the cases in which the writ might lie in England: indeed it would be very laborious, and I believe perfectly useless, if not absolutely impossible to do so. One thing, however, is certain, viz., that if the writ is refused in England wherever there is a plain legal remedy open to the party asking it—(which is the main contention of the defendants) the cases where it ought to be refused in this country, upon that principle, would be much more numerous than they would be in England; for under our system there is no wrong without a legal remedy. Now the principle contended for by the defendants, and acted upon by the court below, is one which suffers no doubt, and is found to pervade not only all the English authorities on the subject; but has been acted

upon in the court, in the case of *The Municipality of Pointe Claire v. The Turnpike Co.*,* in February, 1882. That was a case of injunction; but, *quoad hoc*, it was held in the Court of Appeals in *Bourgoin v. The N. C. R. R.* † that injunction was the same as mandamus. As to the necessity of the absence of an adequate legal remedy, a great number of leading cases are cited in the note to p. 18 of Tapping on Mandamus; and the rule deducible from all the authorities is stated by the author of the treatise as follows:—"The writ of mandamus is not a writ grantable of right; but by prerogative; and amongst other things, it is, as before stated (a) the absence or want of a specific legal remedy which gives the court jurisdiction to dispense it. It is not granted to give an easier or more expeditious remedy; but only where there is no other remedy being both legal and specific; and so long and uniformly has the court adhered to this doctrine, and refused to grant, or if granted, quashed, the writ in cases where there is a specific legal remedy, either at common law, or by act of Parliament, that it has become a principle of the law of this subject. The principle applies where there is another, and a better remedy, or where a specific remedy exists, notwithstanding that it has been, by circumstances, rendered unavailing, for it is rare to grant the writ where there is any other remedy."

It cannot be doubted that under our law the plaintiff had a direct action against the R. R. company to compel them to do whatever they were obliged to do by the statute, within a certain time, in default of which the plaintiff might do it himself at their cost.

This view of the case makes it unnecessary to enter on the question of damages, or on that of the liability of the South Eastern Company as lessees of the road. Judgment confirmed with costs in both courts.

Judgment confirmed.

Prefontaine & Co. for the plaintiff.

O'Halloran & Co. and *Kerr & Co.* for the defendants.

* 5 L. N. 259.

† 19 L. C. J. 57.

SUPERIOR COURT.

SWEETSBURG, December 1, 1883.

Before BUCHANAN, J.

EATON v. UNWIN *et al.**Interpretation of Contract—Interest.*

Plaintiff in 1879 sold defendants 50 acres of land for \$2000, payable in 20 annual instalments of \$100 each, the whole at four per cent per annum. The deed of a sale contained a clause to the effect that plaintiff was to allow defendants eight per cent on all payments made in advance from the date of payment till the time they should have become due. Defendants paid two instalments of \$100 each when they became due; then tendered \$500 in full payment of the balance (\$1,800), claiming a discount of \$1,300 under said clause. Plaintiff brought action for \$248, one instalment of principal and two years' interest, defendants pleading their tender and depositing the money in court.—*Held*, rejecting defendants' tender and deposit as insufficient, that the intention of the parties must be determined by interpretation rather than by adherence to the literal meaning of the words of the contract.

R. A. Crothers for plaintiff.

O'Halloran & Duffy for defendant.

COUR DE CIRCUIT.

ARTHABASKA, 13 Décembre 1883.

Coram PLAMONDON, J.

THÉROUX, père v. GREENE.

Frais—Distraction.

Juge :—Lorsqu'il n'y a pas de distraction de dépens dans une cause en faveur d'un procureur ad litem, ce procureur n'a pas le droit de recevoir de sa partie, les frais dus à l'huissier pour service; mais sa partie doit payer à l'huissier.

Le demandeur réclame du défendeur la somme de \$17.25 pour services professionnels, rendus par le demandeur, en sa qualité d'huissier, au défendeur à sa demande et réquisition, son bénéfice et avantage, aux dates, dans les causes et pour les prix portés au compte produit avec les présentes.

Le dit défendeur pour défenses à cette action, dit 1o. qu'il n'a jamais requis les services du demandeur; 2o. Que les différents items

du compte du demandeur formaient partie des mémoires de frais de MM. Felton et Blanchard, les procureurs *ad lites* du défendeur dans les différentes causes mentionnées au dit compte; que le défendeur a payé ces mémoires de frais longtemps avant la présente action, et ce à la connaissance du défendeur. Le défendeur fait la preuve de ses dites défenses.

PER CURIAM. Jugement en faveur du demandeur pour le montant réclamé; les procureurs *ad litem* n'avaient pas le droit de retirer ce qui était dû au demandeur quand ils n'avaient pas en leur faveur distraction de frais.

Laurier & Lavergne pour le demandeur.

Pacaud & Cannon pour le défendeur.

SALE OF A WIFE.

The old notion that wives are chattels which may be bartered or sold is not entirely eradicated in England. The following is a recent case:—

Before Mr. Justice Denman, at the Liverpool Assizes, Betsy Wardle was charged with marrying George Chisnal at Eccleston bigamously, her former husband being alive. The case was a peculiar one. It was stated by the woman that as her first husband had sold her for a quart of beer, she thought she was at liberty to marry again.

His Lordship—That is not what she stated before the magistrate. She said then that he was idle and would not work. When she left him she took the child with her, and he said if she would let him have the child he would not trouble her any further. He added that he would sell her for a quart of beer.

Prisoner—Please your worship, he did so. (Laughter.)

His Lordship—Is there anybody here who knows that? Yes, My Lord; Alice Roseby and Margaret Brown.

His Lordship—Call Margaret Brown.

Margaret Brown thereupon stepped into the box and was cross-examined by his lordship. She said she was present at the second marriage. She knew the first husband Wardle was alive; she was told that he had sold her for a quart of beer.

His Lordship—You believed it would be binding? Yes, Sir.

His Lordship—And you thought it right she should marry again? She wished me to give her away, and I did so. (Laughter.)

His Lordship—You helped her to commit bigamy. Take care you do not do it again or you will get yourself into trouble.

Alice Roseby was next called, and said she saw Wardle drink one glass of the quart.

His Lordship—Who was the bargain made with? With George Chisnal.

His Lordship—I am not sure that you are not guilty of bigamy, or of being an accessory before the fact. You must not do this sort of thing again. People have no right to sell their wives for a quart of beer or anything else. (Laughter.)

George Chisnal, the second husband, apparently just out of his teens, was the next witness called.

His Lordship—How did you come to marry this woman? Witness (in the Lancashire vernacular)—Hoo did a what? (Laughter.) Question repeated—A bowt her (Laughter.)

His Lordship—You are not fool enough to suppose you can buy another man's wife? Oi. (Laughter.)

His Lordship—How much did you give for her? Sixpence. (Great laughter.)

His Lordship—You are as guilty as she is. You are an accessory before the fact to her committing bigamy. You have committed bigamy yourself. Everybody has committed bigamy in this case. (Laughter.) Go down.

The witness left the box with alacrity, but was immediately recalled by his Lordship, who asked him how long he had lived with the prisoner.

Witness—Going on for three years.

His Lordship—Do you want to take her back again? Awl keep her if you loike. (Laughter.)

His Lordship—You need not keep her if you do not want. She is Wardle's wife.

Mr. Swift, addressing his lordship, said all he wished to say on behalf of this unfortunate woman was this—that she seemed to have met with a bad husband, in the first place, and an ignorant man in the second. He could only venture to hope that his lordship would not think it a case in which she ought to be punished—at least, not severely.

His Lordship directed that Wardle should be called, and this was done without eliciting any answer.

His Lordship—(addressing the prisoner)—It is absolutely necessary that I should pass some punishment upon you in order that people may understand that men have no more right to sell their wives than they have to sell other people's wives, or to sell other people's horses or cows, or anything of the kind. You cannot make that a legal transaction. So many of you seem to be ignorant of that, that it is necessary I should give you some punishment in order that you may understand it. It is not necessary that it should be long, but you must be imprisoned and kept to hard labour for one week.

MERCANTILE FAILURES.

According to Messrs. Dun, Wiman & Co. the record of mercantile failures in the Dominion and Newfoundland last year compared with preceding periods, stands as follows:—

	Number.	Liabilities.
1883	1,384	\$15,949,361
1882	787	8,587,657
1881	635	5,751,207
1880	907	7,988,077
1879	1,902	29,347,937
1878	1,697	23,908,677

The increase in the list for last year seems at first glance somewhat serious, but an analysis by provinces gives the following result:

	Number.	Liabilities.
Ontario	567	\$4,700,000
Quebec	438	6,400,000
New Brunswick	48	747,000
Nova Scotia	89	1,068,000
Prince Edward Island	5	40,000
Newfoundland	5	48,000
Manitoba	232	2,869,000
	1,334	\$16,872,000

GENERAL NOTES.

The oldest peer of Great Britain, the Earl of Buckingham, who recently attained his 90th year, is in priest's orders. Besides him eight other peers are in holy orders, namely, the Marquis of Donegal (Dean of Raphoe), the Earls of Delaware, Carlisle, and Stamford, Lord Plunket (Bishop of Meath), Lord Sayne and Sele (Archdeacon of Hereford), Lord Scarsdale, and Lord Hawke. The Earl of Mulgrave, heir apparent to the Marquisate of Normanby, is also a clergyman.

The Legal News.

VOL. VII. JANUARY 12, 1884. No. 2.

JUDICIAL TOPICS IN ENGLAND.

The tour of the Lord Chief Justice in the United States has not only afforded some amusement to the English comic papers, but has caused some alarm to the bar. Says the *Law Times*: "Vested interests, of course, are nothing in these days. At any moment professional or trade security may be threatened. The recent judicial tour in America has not tended to increase the confidence of the bar in the stability of existing institutions. But it was nevertheless scarcely credible that immediately after the reform in our procedure and the erection of Royal Courts, at a vast expense, the head of the law should contemplate entire subversion of the judicature. It is to be hoped that the bar committee will soon be in a position to put the drag on the well-known radical tendencies of prominent members of both bench and bar." This uneasiness seems to have been excited by the reports of some of his lordship's speeches in the United States, and also by the rumor that a scheme of district courts was to be proposed in England. His brother judges even seem to have caught the alarm, and they hold out sturdily against any hint of innovation, for we read that at a meeting of the English Judges, held at the Royal Courts of Justice on Tuesday, December 11th, "the proposal of Lord Chief Justice Coleridge, that the courts should either sit half an hour earlier in the morning or the same time later in the afternoon, was voted down by a large majority."

A MISCHIEVOUS INNOVATION.

Of late years a silly innovation has crept into the Montreal journals: we refer to the publication of a statement of the number of actions taken out by each professional firm during the year. This may please a vanity not at all to be commended, on the part of a few, but it cannot be justified on any sound principle. The number of suits

instituted is a poor test of a lawyer's brains or capacity, not to speak of honesty; and it is not surprising to those who are well informed, to see counsel who are admittedly the leaders of the bar placed a long way down in the list, while their students and their students' students to the fifth generation head the roll. If such a publication has any effect, it is decidedly a mischievous one: it is to encourage the institution of frivolous cases, and to create such a state of things as we sometimes witness, when out of twenty suits decided in one day, more than half are dismissed with costs. It is the part of a wise and conscientious counsel to prevent litigation, not to cultivate it. Dr. Johnson—grand old Samuel, who is passing out of the fashion of this generation—once framed a prayer to be used before entering on the study of the law. It is dated September 26, 1765, and as some of our readers may never have seen it, and it expresses in a few well-chosen words the point of this paragraph, we venture to quote from it:—"Almighty God, the Giver of wisdom, without whose help resolutions are vain, without whose blessing study is ineffectual, enable me, if it be Thy will, to attain such knowledge as may qualify me to DIRECT THE DOUBTFUL, and INSTRUCT THE IGNORANT, to prevent wrongs, and TERMINATE CONTENTIONS, and grant," etc.

EX PARTE PUBLICATIONS.

And while we are flourishing the censor's whip, we may as well add a word concerning another abuse which has existed so long that it can hardly be considered a novelty. We do not think that in any other place in the world the newspapers indulge so freely in *ex parte* statements of legal proceedings. It often happens that before an action is served upon the unfortunate defendant he finds the highly colored statements of the declaration selling on the street. Before he knows what are the precise charges against him, the world at large, with the aid of the telegraph, has a grossly exaggerated version served up to it. This system has been the cause of much mischief in the past—not that the judges who under our system have to try the cases, are affected by such statements

but it adds a new terror to life to know that a grossly exaggerated declaration may be published before the defendant has even had a chance of seeing it, let alone answering it, and persons are coerced into unjust settlements and compromises. Moreover, the very journals which are most eager to print these one-sided statements seldom make any mention of the final decision of the cases so unfairly presented to the public. It is right that what takes place in open court should be impartially reported, for there the defendant is represented by counsel, and has a chance to be heard, but as to these premature statements of suits entered, it is much to be desired that more discretion will soon be exercised by the conductors of public journals.

NOTES OF CASES.

PRIVY COUNCIL.

LONDON, December 1, 1883.

Before Lord FITZGERALD, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, & SIR ARTHUR HOBHOUSE.

THE COLONIAL BUILDING & INVESTMENT ASSOCIATION (defts. below), appellants, and **LORANGER, Atty.-Gen.** (petr. below), respondent.

Federal and local jurisdiction—Building and Investment Association—37 Vict., (Can.) c. 103.

1. *The Act incorporating the company appellant, for the purposes set out below, was not ultra vires of the Parliament of Canada.*
2. *Although, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown, and the power to repeal or modify this law belongs exclusively to the Provincial Legislature, yet the powers found in the Act of incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown.*

3. *The question whether the company had, in fact, violated the law of the Province by acquiring and holding land without having obtained the consent of the Crown, was not in issue in this case.*

4. *The fact that the company had not hitherto extended its operations to the full limits of its corporate authority was no reason for declaring its Act of incorporation illegal, if the Act was originally within the legislative power of the Dominion Parliament.*

The appeal was from a judgment of the Court of Queen's Bench, reported in 5 Legal News, p. 116.

PER CURIAM. This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing a judgment of the Superior Court, which dismissed the petition of the Attorney General of the province, praying that it be declared that the Appellant Company had been illegally incorporated, and that it be ordered to be dissolved, and prohibited from acting as a Corporation.

The judgment now appealed from did not grant the prayer of the petition, but gave other relief, in the manner to be hereafter adverted to.

The Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vict., c. 103). The preamble states—

That the persons therein-after named, 'owners of real estate in the city and district of Montreal, and elsewhere in the Dominion, have petitioned for an Act of Incorporation, to establish an Association to be called the Colonial Building and Investment Association, whereby powers may be conferred on the said Association for the purpose of buying, leasing, or selling landed property, buildings, and appurtenances thereof; for the purchase of building materials, to construct an improved class of villas, homesteads, cottages, and other buildings and premises, and to sell or let the same; and for the purpose of establishing a building or subscription fund, to which persons may subscribe or pay in money for investment or for building purposes, and from which payments may be made for said purposes; and also to act as an agency.'

Sec. 1 incorporates the Association.

Sec. 4 enacts that the Association shall have power to acquire and hold, by purchase, lease, or other legal title, any real estate necessary for the carrying out of its undertakings; to construct and maintain houses or other buildings; to let, sell, convey, and dispose of the said property; to acquire and use or dispose of every description of materials for building purposes;

to lend money on security, by mortgage on real estate, or on Dominion or Provincial Government securities, or on the stocks of chartered banks in the Dominion; and to acquire, hold, and dispose of public securities, stocks, bonds, or debentures of any corporate bodies, and other defined securities. The clause provides that the Association shall sell the property so acquired within five years from the date of the purchase thereof.

Sec. 5 enables the Association to act as an agency and trust company.

Sec. 11 provides that the chief office of the Association shall be in the city of Montreal, and that branch offices or agencies may be established in London, England, in New York, in the United States of America, and in any city or town in the Dominion of Canada, for such purposes as the Directors may determine, in accordance with the Act; and that bonds, coupons, dividends, or other payments of the Association may be made payable at any of the said offices or agencies.

The Secretary of the Association, the only witness called in support of the petition, proved that the Association had bought lands, erected houses on such lands, and sold them, and had also built houses on the lands of others, and lent money on real estate. He stated that these operations had hitherto been confined to the province of Quebec, though efforts had been made to extend the business of the Company to other provinces, and to establish agencies in Glasgow and New York, which had failed in consequence of the inability of the Association to raise sufficient capital.

In order to understand the question which ultimately became the principal one to be considered in this Appeal, viz., whether the judgment of the Court of Queen's Bench is properly founded upon the Attorney General's petition, it is necessary to refer to the provisions of the Code of Civil Procedure of Lower Canada on which the proceedings are based, the scope and prayer of the petition, and the nature and form of the judgment appealed from.

The heading of Chapter 10, Section 1, of the Code is, "Of Corporations illegally formed, or violating or exceeding their powers."

Art. 997 is as follows:—

"In the following cases,—

"(1.) Whenever any association or number of persons acts as a Corporation without being legally incorporated or recognised;

"(2.) Whenever any Corporation, public body, or board, violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its cor-

porate rights, privileges, and franchises, or exercises any power, franchise, or privilege which does not belong to it, or is not conferred upon it by law, it is the duty of Her Majesty's Attorney General for Lower Canada to prosecute in Her Majesty's name such violations of the law whenever he has good reason to believe that such facts can be established by proof in every case of public general interest, but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding; and in such case the special information must mention the names of the person who has solicited the Attorney General to take such legal proceedings, and of the person who has become security for costs."

Art. 998 (as amended) reads:—

"The summons for that purpose must be preceded by the presenting to the Superior Court, or to a Judge, of a special information containing conclusions adapted to the nature of the contravention, and supported by an affidavit to the satisfaction of the Court or Judge, and the writ of summons cannot issue upon such information without the authorisation of the Court or Judge."

The material allegations of the petition filed by the Attorney General are the following:—

"That the 'Colonial Building and Investment Association' for years past have been and still are acting as a Corporation in the city of Montreal, and elsewhere, in the Province of Quebec exclusively, and as such, ever since the date of its existence hereinafter mentioned, have been buying, leasing, and selling landed property, buildings, and appurtenances thereto, constructing villas, homesteads, cottages, and other buildings, and selling and letting the same, and have also been lending money on security by mortgage or hypothec on real estate in this province, the whole without being legally incorporated or recognised.

"That the operations and business of the said Association have been limited to the Province of Quebec, and being, moreover, of a merely local or private nature in the said province, and having provincial objects affecting property and civil rights in the said province, the said Association could not lawfully be incorporated, except by or under the authority of the Legislature of the Province of Quebec.

"That the said Association was incorporated by the Parliament of Canada, in the year one thousand eight hundred and seventy-four, 37th Victoria, chapter 103, and has ever since been in operation under the said Act of Incorporation which, for reasons above alleged is null and void and of no effect, the said Act of incorporation being *ultra vires*.

"Wherefore your petitioner prays that a writ of summons upon the affidavit hereto annexed be ordered to issue in due course of law, and that the said Defendants be adjudged and declared to have been, and to be illegally formed and incorporated, and that the said illegal Association may be ordered to be dissolved, and be declared dissolved, and finally, that the Defendants be prohibited from acting in future as such Corporation, the whole with costs distracts to the undersigned attorneys."

The petition was verified by affidavit, as required by the Code, and thereupon an order for a writ of summons against the Company was issued by a judge.

The petition also alleges that it was presented at the solicitation of John Fletcher, a shareholder of the Company, who had become security for costs. It appears that Fletcher was in default in payment of his calls, but in the view their Lordships take of the case any further reference to this relator becomes immaterial.

The broad objection taken by the Attorney General in the petition is, that the Association was not legally incorporated, the statute incorporating it being *ultra vires* of the Parliament of the Dominion.

The judgment of the Superior Court, given by Mr. Justice Caron, distinctly overruled this objection. Mr. Justice Tessier is the only Judge of the Court of Queen's Bench who affirmed it. Chief Justice Dorion, in a judgment which received the concurrence of two other Judges, acknowledged that having regard to the observations of this Board in the case of *The Citizens Insurance Company of Canada v. Parsons* (L. R., 7 Appeal Cases, 96), it could not be held that the incorporation of the Association was beyond the powers of the Dominion Parliament, and illegal; and the majority of the Court gave judgment upon the assumption, as their Lordships understand the reasons of the Judges, that the Association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follows:—

"That the said Company, Respondents, had and have no right to act as a corporation for or in respect of any of the said operations of buying, leasing, or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature in any manner or way within the said Province of Quebec, and doth prohibit the said Company Respondents, from acting as a Corporation within the said Province of Quebec for any of the ends or the purposes aforesaid."

Mr. Justice Monk, in a short but clear

judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the Association was not lawfully incorporated. Although the observations of this Board in the *Citizens Insurance Company v. Parsons*, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of Companies.

It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the Association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the Provincial Legislature. But surely the fact that the Association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a Corporation, if the Act incorporating the Association was originally within the legislative power of the Dominion Parliament. The Company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a Corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, viz., that the Company be declared to be illegally constituted.

It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act.

Their Lordships therefore think that the Courts in Canada were right in holding that it was not competent to them to declare, in accordance with the prayer of the petition,

that the Association was illegally incorporated, and ought to be dissolved.

There remains the question, which was mainly argued at the bar, whether the judgment of the Court of Queen's Bench which, shortly stated, declares that the Association has no right to act as a Corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

It was not disputed by the Counsel for the Attorney General that, on the assumption that the Corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the Company contravened the provincial law, at the least, in two respects, viz, in dealing in land, and in acting in contravention of the Building Acts of the province.

It may be granted that, by the law of Quebec, Corporations cannot acquire or hold lands without the consent of the Crown. This law was recognized by this Board, and held to apply to foreign Corporations in the case of the *Chaudière Gold Mining Company v. Desbarats* (L. R., 5 P. C. 277). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of Section 92 of the British North America Act, viz, "Property and Civil-Rights within the Province," and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the Company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit Corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a Corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz, throughout the Dominion. Among

other things, it has given to the Association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the Company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

It is said, however, that the Company has, in fact, violated the law of the province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation by a Corporation of the mortmain laws would involve an inquiry opening questions (some of which were touched upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage of it; questions which are certainly not raised by the allegations and conclusions of this petition.

So with respect to the objections founded on the Acts of the Province with regard to building societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the Legislature of the province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present Association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of these Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the Association in question.

If the Association by its operations has really infringed the Provincial Building Societies Acts, a proper remedy may doubtless be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed, with reference to the supposed contravention of the mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been, done the

allegations and conclusions the petition really contains. The first paragraph, after stating that the Corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without being legally incorporated or recognized."

The 2nd paragraph avers that the operations of the Company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the province, "could not lawfully be incorporated except by the authority of the Legislature of the province."

The 3rd paragraph alleges that, for these reasons, "the Act of Incorporation is null and void, the said Act of Incorporation being *ultra vires*."

The conclusion and prayer based on these allegations are, that the Association be declared to be illegally incorporated, be declared dissolved, and prohibited from acting in future as a Corporation.

It seems to their Lordships it would be a violation not only of the ordinary rules of procedure, but of fair trial, to decide this appeal upon a new case which, assuming a lawful incorporation, rests on the supposed infringement of the laws of the province by the Company in conducting its operations. This is not the wrong struck at by the petition, but a wrong-doing raising issues of a wholly different character to those to which the allegations and conclusions of the petition are alone directed and adapted. It is to be observed that the inquiries made of the Company's Secretary were of a general nature, and mainly directed to support the allegation in the petition that the Company's operations had been limited to the Province of Quebec. No investigation of the title to any of the lands it held, nor of any particular transaction, was gone into at the hearing.

The 998th article of the Code of Civil Procedure requires that the summons to be issued "must" be preceded by a petition to the Court containing "conclusions adapted to the nature of the contravention," to be supported by an affidavit; and provides that the summons cannot be issued upon such information without the authority of a Judge. It is quite plain that the conclusions of this petition are not adapted to the case now relied on by

the Attorney General; so that neither the general principle regulating procedure nor the special requirements of the Code allow of its being set up on these proceedings.

If the Company is really holding property in Quebec without having complied with the law of that province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violations; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company, in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a Corporation could only exercise its powers subject to the law of the province, whatever it might be, in this respect.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the Company "be prohibited from acting in future as a Corporation within the Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused, there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the judgment of the Court of Queen's Bench is not an injunction limited to restraining the Company from doing specified acts in violation of particular laws of the province, but is a general prohibition founded on a declaration introduced by the Court, other than those prayed for, that the Company has no right to act as a Corporation in dealing with lands and buildings, and certain other matters within the province. This declaration, with the prohibition founded on it, is obviously too extensive. A prohibition in these wide and sweeping terms would prohibit the Company from acquiring or dealing in lands, though it had

the Crown's consent, and could only be warranted by affirming the invalidity of the Act of Incorporation, which would be opposed to what has been stated in the previous part of this judgment to be their Lordships' view; or at least by affirming that the Company, in exercising its powers in the province, must necessarily violate the provincial law, which, as already shown, is not a necessary consequence.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, and to order that the judgment of the Superior Court be affirmed, and that the present Appellant's costs of the appeal to the Court of Queen's Bench in Canada be paid by the present Respondent. The Appellant must also have the costs of the appeal to Her Majesty.

Judgment reversed.

Henry Mathews, Q.C., W. W. Robertson, Q.C., (of the Quebec bar), and *McLeod Fullarton* for the appellants.

Gibbs, Q. C., Girouard, Q.C., (of the Quebec bar) and *Tudor Boddam* for the respondent.

SUPERIOR COURT.

MONTREAL, October 31, 1883.

Before JOHNSON, J.

MENARD v. PELLETIER.

Obligation with term—Insolvency of lessee—1092 C. C.

Under C. C. 1092, the mere fact of insolvency causes the debtor to lose the benefit of the stipulated term, independently of the question of diminished security; hence rent not yet exigible by the terms of the lease becomes so by the insolvency of the tenant though the gage be not diminished.

PER CURIAM.—The action is for rent, with process of *saisie gagerie*, and the amount due at the time of instituting the action was only \$40; but a larger sum, \$364.50, to become due by the terms of the lease, was asked on the ground of the defendant's notorious insolvency. The defendant, interrogated on *faits et articles*, admitted the whole case; but it was ingeniously suggested by the counsel for the defendant that rent not actually due and exi-

gible by the terms of the lease did not become so by the insolvency of the debtor, on the supposition that the *gage* or security for the rent was not diminished; and this point was raised by a demurrer which was reserved; but I entirely agree with the decision in *Hamilton v. Valade* (30 Nov. 1882, Jetté, J.,) and which was confirmed in review, that Art. 1092 C. C. makes the debtor lose the benefit of the stipulated term by the mere fact of insolvency, independently of the question of diminished security for the rent.

Judgment for plaintiff.

Cressé & Cressé for plaintiff.

Duhamel & Rainville for the defendant.

RECENT ENGLISH DECISIONS.

Maritime law—peril of sea—bill of lading—carrier—A collision between two vessels, brought about by negligence of either of them, without the waves or wind or difficulty of navigation contributing to the accident, is not "a peril of the sea" within the terms of that exception in a bill of lading. Ct. of App., March 21, 1883. *Woodley v. Michell*. Opinion by Brett, Cotton and Bowen, L. JJ. (L.R., 11 Q. B. D. 47.)

Negligence—of contractor in building causing party-wall to fall—owner's liability.—The appellant and respondent were owners of adjoining houses between which was a party-wall, the property of both. The appellant's house also adjoined B.'s house and between them was a party-wall. The appellant employed a builder to pull down his house and rebuild it on a plan which involved the tying together of the new house and the party-wall between it and the respondent's house, so that if one fell the other would be damaged. In the course of the rebuilding the builder's workmen in fixing a staircase negligently and without the knowledge of the appellant cut into the party-wall between the appellant's house and B.'s house, in consequence of which the appellant's house fell, and the fall dragged over the party-wall between it and the respondent's house and injured the respondent's house. The cutting into the party-wall was not authorized by the contract between the appellant and his builder. *Held*, affirming the decision of the Court of Appeal, that the

law cast a duty upon the appellant to see that reasonable care and skill was exercised in those operations which involved a use of the party-wall belonging to himself and the respondent, exposing it to the risk above mentioned; and that the appellant could not get rid of responsibility by delegating the performance to a third person; and was liable to the respondent for the injury to his house. House of Lords, June 4, 1883. *Hughes v. Percival*. Opinions by Lords Blackburn, Watson, and Fitzgerald. (L. R., 7 App. Cas. 443.)

GENERAL NOTES.

The Supreme Court of Georgia has decided that cotton-future notes are absolutely void, because given in a gambling transaction.

The property of the religious orders in France in 1848 was estimated at 43,000,000fr. At the present moment it is set down at 712,536,000fr., or sixteen times more.

In the Circuit Court for the district of Montreal, 9,581 cases were taken out during the past year, as compared with 8,410 in 1882, an increase of 1,171. The number of ejectment cases taken out during the year under the Lessor and Lessee Act was 461, against 364 the previous year, an increase of 97.

During the past year 6,608 miles of track were built by railway companies in the United States, against 11,591 miles in 1882, 9,784 miles in 1881, and 7,174 miles in 1880, but, with the exception of these years, the mileage of 1883 has been previously exceeded only in 1871. The total railway mileage in the United States now foots up to 120,000 miles.

During the first cold term of this month 23° below zero was registered (Jan. 5) at St. Louis, and 27° below at Chicago. At Montreal the lowest temperature during the same cold term was 14° below. It is to be feared that St. Louis will hardly give unlimited satisfaction to the "arctic birds" who migrate from this margin of the frozen zone (see 6 L. N. p. 337) to seek a milder clime.

It sounds like a landmark in history, says the *London Times*, when we are told that there is no more room for interments in Westminster Abbey. Matters must have come to this pass when the dean has had to deny ground to the most distinguished member of that inventive class which the Roman poet admitted into the Pagan Elysium. It is said of the last two interments, those of Darwin and Spottiswoode, that the coffins were only a very few feet below the surface. For a long time there have been ghastly stories of the disturbance necessary to the finding room for a new arrival. This has been the case, indeed, for a century and a half, or more. Chaucer's grave was molested to make way for Dryden's, Ben Jonson's bones fell out one by one into the grave prepared for Sir Robert Wilson, and came in sight again when a grave was

dug for John Hunter. Addison lies upon the Duchess of Albemarle, and upon him James Craggs.

A judgment has been given in an interesting case before the Court of Appeal at Turin. Miss Lydia Poet, who has obtained a doctor's degree in law, was refused admittance to the roll of advocates for reasons among which are the following:—"The Italian law has made no disposition expressly consenting to the exercise of the profession of advocate by women, and it has always regarded that profession as exclusively pertaining to men. The admission of women would be extraordinary and contrary to custom, and is, besides, expressly forbidden by an article of common law (article quoted.) It would be an unpleasant sight to see a woman pleading amid the tumult of a public court, and sometimes obliged to treat *ex professo* questions that common decency forbids even men to discuss in the presence of honest women. The sight of the toga worn over the strange and whimsical dress which fashion often imposes upon women would imperil the gravity of the judges. Every time the balance of justice leaned to the side of a prisoner defended by a pretty female advocate the judges would be exposed to suspicion and calumny." The Court of Appeal also held that that was neither the time nor the place to discuss the equality of women and their right to exercise all professions and offices hitherto occupied exclusively by men.

In a lecture in New York on "Fashions in Marriage," Mr. Capel said:—"I lived for years in France. The French system of contracting marriage ignores entirely the wishes and prejudices of the girl, and regards only the convenience to the parties. From such a system one naturally supposes unhappy unions would emanate, but on the contrary, I must bear witness that for the most part the marriage relation in France is very happy. I saw more happy marriages in France than in any other country. Nowhere is love of children so deep and strong as in France. On the other hand, in England the making of marriage contracts is in general entirely a matter of love. This love idea is carried to a preposterous extent. Nowhere else do we see dukes and marquises marrying their servants, ladies marrying their coachmen, and old women of three score and ten marrying youths scarcely twenty. The system ripens out into divorces, until to-day the courts cannot do the work they are called upon to do."

The thoughtful-looking man, with wrinkles in his forehead, is not exhibiting signs of mental strength, but of weakness. Brain tension exhibits effort, and effort shows that the intellectual machinery is not running smoothly. The man with the strong mind does his brain work easily. "Tension is friction," says the *Lancet*, "and the moment the toil of the brain becomes laborious it should cease. We are, unfortunately, so accustomed to see brain work done with effort that we had come to associate effort with work, and to regard tension as something tolerable, if not natural. As a matter of fact no man should ever knit his brow as he thinks, or in any way evince effort as he works. The best brain work is done easily, with a calm spirit, an equable temper, and in jaunty mood. All else is the toil of a weak or ill-developed brain straining to accomplish a task which is relatively too great for it."

The Legal News.

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THE BOUNDARY QUESTION.

The literature of the Boundary Question has received another contribution. The author complains, very justly, that the question has been obscured by a vast quantity of gossip and other irrelevant matter. His object is, therefore, to restore the simplicity of the original question, and to indicate the single source from which the real answer is to be drawn. For the expression of his views he has adopted the form of a report of a special committee of the Legislative Assembly of the imaginary Province of "Kewadin." In support of the conclusions of this fictitious report is added the evidence on which it purports to be based. But here the fiction ends. The arguments are, of course, serious, the documents and statutes real, and the evidence a careful condensation of all that is important in that actually taken before Mr. Dawson's committee. The work is very thoroughly done, and represents an immense deal of patient investigation, and careful discrimination. He points out the reasons why the Statute of 1774 is the ground-work of the whole argument, and that by it any prerogative rights of the Crown, in the lands ceded by France, derived from conquest or treaty, ceased. Again, he shows that the Act of 1791 does not purport to establish the boundaries of the Province of Quebec, but to divide it into two provinces, and that, incidentally, it has defined no other boundary than the line separating Upper from Lower Canada. Finally, he establishes that Orders-in-Council, Commissions, Instructions, and Proclamations cannot alter the express terms of an Act of Parliament. He contends that the terms of the Act of 1774 are express, and that they fix as the northern boundary of the then Province of Quebec the watershed between Hudson's Bay and the St. Lawrence. In support of this the pamphlet contains the facsimile of a French map of 1656, prepared by M. Sanson, Géographe du Roi, which

admits the watershed to be, by the consent of all the Maritime States, the unquestioned, as it is the unquestionable, limits of the English and French possessions. The Act also fixes the western boundary, which, from its nature, is even more precise than the northern boundary, for the former is a mathematical line from a point fixed till it strikes another line whose general course is transversal. The word used in the Statute is "northwards," and the efforts of the jurists of the Ontario Government have been to get people to believe that northwards means generally westwards, even where no impediment prevented the line going, in the most direct way, due north. It need hardly be said that these propositions of the Ontario lawyers misled no one; not even the so-called Arbitrators, who, disregarding every consideration but their own foregone conclusions, which, curious to say, coincided to a tittle, laid down a line so purely conventional that it contradicts every Statute, and every Executive document, and the pretension of every man, woman and child who has a word to say in the matter.

There is one branch of the subject, as it now presents itself, which, it is to be regretted, has not been treated by so ingenious a disputant, as the anonymous author, who controls the presses of the "Knisteneaux Printing Company" in the far-famed city of "Winnepegosis." On the merits of the original Boundary question, the Government of Ontario has not the shadow of an argument; but there is what, in popular language, is called an award, and it has to be determined what is the legal effect, however unjust it may be, of the decision of Chief Justice Harrison, Mr. Thornton and Sir Francis Hincks. Such an investigation includes several branches of enquiry, and principally: (a) How far such a submission is obligatory; (b) The terms of the submission and whether the so-called arbitrators have acted within its terms; (c) The submission of the question to the Judicial committee and the effects of such submission.

The judgment of the Privy Council in the important case of *Hodge v. The Queen* occupies our space this week, to the exclusion of other matter. A review of the case by "R" will appear in our next issue.

Appeal by Spragge, C.J., and Burton, J.A., are able and elaborate, and were adopted by Patterson and Morrison, JJ., and their Lordships have derived considerable aid from a careful consideration of the reasons given in both Courts.

The appellant now seeks to reverse the decision of the Court of Appeal, both on the two grounds on which the case was discussed in that Court and on others technical but substantial, and which were urged before this Board with zeal and ability. The main questions arise on an Act of the Legislature of Ontario, and on what have been called the resolutions of the License Commissioners.

The Act in question is chapter 181 of the Revised Statutes of Ontario, 1877, and is cited as "the Liquor License Act."

Sec. 3 of this Act provides for the appointment of a Board of License Commissioners for each city, county, union of counties, or electoral district as the Lieutenant-Governor may think fit, and secs. 4 and 5 are as follows:—

"Sec. 4. License Commissioners may, at any time before the first day in each year, pass a resolution, or resolutions, for regulating and determining the matters following, that is to say:—

"(1) For defining the conditions and qualifications requisite to obtain tavern licenses for the retail, within the municipality, of spirituous, fermented, or other manufactured liquors, and also shop licenses for the sale by retail, within the municipality, of such liquors in shops or places other than taverns, inns, alehouses, beerhouses, or places of public entertainment.

"(2) For limiting the number of tavern and shop licenses respectively, and for defining the respective times and localities within which, and the persons to whom, such limited number may be issued within the year from the first day of May of one year till the thirtieth day of April inclusive of the next year.

"(3) For declaring that in cities a number not exceeding ten persons, and in towns a number not exceeding four persons, qualified to have a tavern license, may be exempted from the necessity of having all the tavern accommodation required by law.

"(4) For regulating the taverns and shops to be licensed.

"(5) For fixing and defining the duties, powers, and privileges of the Inspector of Licenses of their district.

"Sec. 5. In and by any such resolution of a Board of License Commissioners, the said Board may impose penalties for the infraction thereof."

Sec. 43 prohibits the sale of intoxicating liquors from or after the hour of seven of the clock on Saturday till six of the clock on Monday morning thereafter.

Sec. 51 imposes on any person who sells spirituous liquors without the license by law required, or otherwise violates any other provision of the Act, in respect of which violation no other punishment is prescribed, for the first offence a penalty of not less than twenty dollars and not more than fifty dollars, besides costs, and for the second offence imprisonment with hard labor for a period not exceeding three calendar months.

Sec. 52. For punishment of offences against sec. 43 (requiring taverns, &c., to be closed from seven o'clock on Saturday night until six o'clock on Monday morning), a penalty for the first offence of not less than twenty dollars, with costs, or fifteen days' imprisonment with hard labor, and with increasing penalties for second, third, and fourth offences; and sec. 70 provides that where the resolution of the License Commissioners imposes a penalty it may be recovered and enforced before a magistrate in the manner and to the extent that by-laws of municipal corporations may be enforced under the authority of the Municipal Act.

License Commissioners were duly appointed under this statute, who, on 25th April, 1881, in pursuance of its provisions, made the resolution or regulation now questioned in relation to licensed taverns or shops in the city of Toronto, which contains (*inter alia*) the following paragraphs, viz:—

"Nor shall any such licensed person, directly or indirectly as aforesaid, permit, allow, or suffer any bowling alley, billiard or bagatelle table to be used, or any games or amusements of the like description to be played in such tavern or shop, or in or upon any premises connected therewith, dur-

ing the time prohibited by the Liquor License Act or by this resolution, for the sale of liquor therein.

"Any person or persons guilty of any infraction of any of the provisions of this resolution shall, upon conviction thereof before the Police Magistrate of the city of Toronto, forfeit and pay a penalty of twenty dollars and costs; and in default of payment thereof forthwith, the said Police Magistrate shall issue his warrant to levy the said penalty by distress and sale of the goods and chattels of the offender; and in default of sufficient distress in that behalf, the Police Magistrate shall by warrant commit the offender to the common gaol of the city of Toronto, with or without hard labor, for the period of fifteen days, unless the said penalty and costs, and all costs of distress and commitment, be sooner paid."

The appellant was the holder of a retail license for his tavern, and had signed an undertaking as follows:—

"We, the undersigned holders of licenses for taverns and shops in the city of Toronto, respectively acknowledge that we have severally and respectively received a copy of the resolution of the License Commissioners of the city of Toronto to regulate taverns and shops, passed on the 25th day of April last, hereunto annexed, upon the several dates set opposite to our respective signatures, hereunder written, and we severally and respectively promise, undertake, and agree to observe and perform the conditions and provisions of such resolution.

"2nd May, Tavern. A. C. HODGE (L.S.)"

He was also holder of a billiard license for the city of Toronto to keep a billiard saloon with one table for the year 1881, and, under it, had a billiard table in his tavern.

He did permit this billiard table to be used as such within the period prohibited by the resolution of the License Commissioners, and it was for that infraction of their rules he was prosecuted and convicted.

The preceding statement of the facts is sufficient to enable their Lordships to determine the questions raised on the appeal.

Mr. Kerr, Q.C., and Mr. Jeune, in their full and very able argument for the appellant, informed their lordships that the first and

principal question in the cause was whether "The Liquor License Act of 1877," in its fourth and fifth sections, was *ultra vires* of the Ontario Legislature, and properly said that it was a matter of importance as between the Dominion Parliament and the Legislature of the Province.

Their lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C. J., "that in all these questions of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." They do not forget that in a previous decision on this same statute (*Parsons v. The Citizens Company**) their Lordships recommended that, "in performing the difficult duty of determining such questions, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand."

The appellants contended that the Legislature of Ontario had no power to pass any Act to regulate the Liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the Provincial Legislature, by sec. 91 of the British North America Act, 1867; and that it did not come within any of the classes of subjects assigned exclusively to the Provincial Legislatures by sec. 92. The clause in sec. 91 which the Liquor License Act, 1877, was said to infringe was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell v. Regina* † was conclusive—that the whole subject of the Liquor traffic was given to the Dominion Parliament, and consequently taken away from the Provincial Legislature. It appears to their Lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that when properly considered, it should be taken rather as an authority in

* 5 L. N. 25, 33.

† 5 L. N. 234.

support of the judgment of the Court of Appeal.

The sole question there was, whether it was competent to the Dominion Parliament, under its general powers to make laws for the peace, order, and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several Provinces of the Dominion, or to such parts of the Provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority under sec. 91, unless the subject fell within some one or more of the classes of subjects which by sec. 92 were assigned exclusively to the Legislatures of the Provinces.

It was in that case contended that the subject of the Temperance Act properly belonged to No. 13 of sec. 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the Provincial Legislature, and it was on what seems to be a misapplication of some of the reasons of this Board in observing on that contention that the appellant's counsel principally relied. These observations should be interpreted according to the subject matter to which they were intended to apply.

Their Lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that:—

"Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada."

And again:—

"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and, though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law."

And their Lordships' reasons on that part of the case are thus concluded:—

"The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects 'Property and Civil Rights' within the meaning of sub-section 13."

It appears to their Lordships that *Russell v. The Queen*, when properly understood, is not an authority in support of the appellant's contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the Citizens' Insurance Company illustrates is, that subjects which in one aspect and for one purpose fall within sec. 92, may in another aspect and for another purpose fall within sec. 91.

Their Lordships proceed now to consider the subject matter and legislative character of secs. 4 and 5 of "The Liquor License Act of 1877, cap. 181, Revised Statutes of Ontario." That Act is so far confined in its operation to municipalities in the province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-laws, or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses for sale by retail of spirituous liquors within the municipality; for limiting the number of licenses; for declaring that a limited number of persons qualified to have tavern licenses may be exempted from having all the tavern accommodation required by law, and for regulating licensed taverns and shops, for defining the duties and powers of License Inspectors, and to impose penalties for infraction of their resolutions. These seem to be all matters of a merely local nature in the province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments.

Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted.

The subjects of legislation in the Ontario Act of 1877, secs. 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of Sec. 92 of British North America Statute, 1867.

Their Lordships are, therefore, of opinion that, in relation to secs. 4 and 5 of the Act in question, the Legislature of Ontario acted within the powers conferred on it by the Imperial Act of 1867, and that in this respect there is no conflict with the powers of the Dominion Parliament.

Assuming that the Local Legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labor, it was further contended that the Imperial Parliament had conferred no authority on the Local Legislature to delegate those powers to the License Commissioners or any other persons. In other words, that the power conferred by the Imperial Parliament on the Local Legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on.

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should

have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in Sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for courts of law, to decide.

Their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or Resolutions are warranted, power to enforce them seems necessary and equally lawful. Their Lordships have now disposed of the real questions in the cause.

Many other objections were raised on the part of the appellant as to the mode in which the License Commissioners exercised the authority conferred on them, some of which do not appear to have been raised in the Court below, and others were disposed of in the course of the argument, their Lordships being clearly of opinion that the resolutions were merely in the nature of municipal or

police regulations in relation to licensed houses, and interfering with liberty of action to the extent only that was necessary to prevent disorder and the abuses of liquor licenses. But it was contended that the Provincial Legislature had no power to impose imprisonment or hard labour for breach of newly created rules or by-laws, and could confer no authority to do so. The argument was principally directed against hard labour. It is not unworthy of observation that this point, as to the power to impose hard labour, was not raised on the rule nisi for the *certiorari*, nor is it to be found amongst the reasons against the appeal to the Appellate Court in Ontario.

It seems to have been either overlooked or advisedly omitted.

If, as their Lordships have decided, the subjects of legislation come within the powers of the Provincial Legislature, then No. 15 of Sec. 92 of the British North America Act, which provides for "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section," is applicable to the case before us, and is not in conflict with No. 27 of Section 91; under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—"hard labour"; in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."

The Provincial Legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners.

It is said, however, that the Legislature did not delegate such powers to the License Commissioners, and that therefore the resolution imposing hard labour is void for excess. It seems to their Lordships that this objection is not well founded.

In the first place, by Sec. 5 of the Liquor License Act, the Commissioners may impose penalties. Whether the word "penalty" is well adapted to include imprisonment may be questioned, but in this Act it is so used, for Sec. 52 imposes on offenders against the provisions of Sec. 43 a penalty of 20 dollars or 15 days' imprisonment, and for a fourth offence a penalty of imprisonment with hard labour only. "Penalty" here seems to be used in its wider sense as equivalent to punishment. It is observable that in Sec. 59, where recovery of penalties is dealt with, the Act speaks of "penalties in money." But,

supposing that the "penalty" is to be confined to pecuniary penalties, those penalties may, by Sec. 70, be recovered and enforced in the manner, and to the extent, that by-laws of municipal councils may be enforced under the authority of the Municipal Act. The word "recover" is an apt word for pecuniary remedies, and the word "enforce" for remedies against the person.

Turning to the Municipal Act, we find that, by sec. 454, municipal councils may pass by-laws for inflicting reasonable fines and penalties for the breach of any by-laws, and for inflicting reasonable punishment by imprisonment, with or without hard labor, for the breach of any by-laws in case the fine cannot be recovered. By secs. 400 to 402 it is provided that fines and penalties may be recovered and enforced by summary conviction before a justice of the peace, and that where the prosecution is for an offence against a municipal by-law the justice may award the whole or such part of the penalty or punishment imposed by the by-law as he thinks fit; and that, if there is no distress found out of which a pecuniary penalty can be levied, the justice may commit the offender to prison for the term, or some part thereof, specified in the by-law. If these by-laws are to be enforced at all by fine or imprisonment, it is necessary that they should specify some amount of fine and some term of imprisonment.

The Liquor License Act then gives to the Commissioners either power to impose a penalty against the person directly, or power to impose a money penalty, which, when imposed, may be enforced according to secs. 454 and 400-2 of the Municipal Act. In either case, the Municipal Act must be read to find the manner of enforcing the penalty, and the extent to which it may be enforced. The most reasonable way of construing statutes so framed is to read into the later one the passages of the former which are referred to. So reading these two statutes, the Commissioners have the same power of enforcing the penalties they impose as the Councils have of enforcing their by-laws, whether they can impose penalties against the person directly, or only indirectly as the means of enforcing money penalties. In either case, their resolution must, in order to give the magistrate jurisdiction, specify the amount of punishment. In either case, their resolution now under discussion is altogether within the powers conferred on them.

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.

Judgment affirmed.

The Legal News.

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HODGE v. THE QUEEN.

There has been almost an outcry as to the decision in the case of *Hodge v. The Queen*. Generally it seems to have been taken as over-ruling the doctrine laid down in *Russell v. The Queen* (5 L. N. 234). This is the more remarkable, as the Judicial Committee took special pains to guard against any misapprehension on this point, and indicated very clearly the distinction between the two decisions. It is hardly necessary to add anything to what their Lordships have said on the matter. In *Russell's* case it was decided that an Act whose object was to "promote temperance in the Dominion," and to make "uniform legislation in all the provinces respecting the traffic in intoxicating liquors," and which did not interfere with any of the powers exclusively assigned to the provinces, was not *ultra vires* of the Dominion Parliament, and that the "Canada Temperance Act, 1878," did not interfere with the exclusive rights of Provincial Legislatures to make laws in relation to:

"9. Shop, saloon, tavern, auctioneer, or other licenses in order to the raising of a revenue for provincial, local, or municipal purposes.

"13. Property and civil rights.

"16. Generally, all matters of a merely local or private nature in the province."

This covers all the serious objections suggested by appellant, for raising the question of the absence of power in a legislature to delegate its authority only indicates a temporary paralysis of the reasoning faculties. The decision therefore amounts to this: (1) that a local legislature has still a right to raise money by tavern licenses; (2) that a law regulating taverns to the extent of preventing the sale of alcoholic drinks, is not an interference with property and civil rights within the meaning of sub-section 13, more than would be a law regulating the sale of

dynamite. Their Lordships add a reason, which will at once be accepted as an incontrovertible canon of interpretation when dealing with the dispositions of the B. N. A. Act. They say: "The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subjects to which it really belongs."

On the third ground their Lordships might have contented themselves with saying, under the principle just laid down as to the true nature and character of the legislation, that the Temperance Act did not regulate a matter of a merely local or private nature in the Province. Rightly they hold that the objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion.

A reason drawn from Section 91, might have been urged in support of the Dominion jurisdiction, but their Lordships thought this discussion unnecessary. It was enough to say, the local powers are not interfered with.

Having so completely answered the objections of the respondent, it is unfortunate that the Privy Council should have used expressions which seem, to some extent, to favour the doctrine that the extension of a statute to the whole of Canada, and apart from any other consideration, of itself removes it from the category of matters of a merely local or private nature in the provinces. According to their Lordships' own theory, it is the object and nature of the legislation that has to be looked at, and therefore the Dominion Parliament can no more extend the limits of its jurisdiction by the generality of the application of its law, than the Provincial legislatures can extend their jurisdiction by localising the application of theirs. The exceptional power given to the Parliament of Canada to declare "local works or undertakings" to be for the general advantage of Canada or for the advantage of two or more provinces, seems to sustain this view. Sect. 92, S. S. 10, c.

The *Hodge* case simply declares that "The Liquor License Act of 1877, Cap. 181, Revised Statutes of Ontario," is within the powers of the local legislature of Ontario, and that in

its operation it does not conflict with "the Temperance Act of 1878."

It is only necessary to quote a few words of the opinion to establish this. Their Lordships declare that the true meaning of the Act is to grant power to Commissioners in each municipality to "make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted."

Two observations at once suggest themselves—first, the question of "municipal institutions in the province" was not discussed in the case of *Russell*, and consequently the decision in *Hodge's* case is not formally in contradiction with that of *Russell*; and 2nd, that the principles on which they rest lead to no confusion, for the general right of the Dominion to make laws relating to public order and safety, does not restrain the power of the local legislatures to regulate these matters which have always been made the subject of municipal control, although their object may be similar. We have in practice an illustration of this constantly before our eyes. The police force in towns subsists on a local law, as part of municipal institutions, and alongside of it we have Dominion Police Forces organized under Dominion laws.

There seems, then, to be no need of alarm that the Privy Council has unconsciously given contradictory decisions in these two cases, nor was there any reason to presume from the *Russell* case, that a different decision than that given would be arrived at in the *Hodge* case. In support of this, it may be said that the Court of Queen's Bench sitting at Quebec, suspended its decision for a considerable time, in the case of the *Corporation of Three Rivers & Sulte*, in the expectation that the decision in *Russell*

v. *The Queen*, might perhaps serve as some sort of guide on the point. After the decision in *Russell's* case was known, the Court held precisely in principle what the Privy Council has since held in *Hodge's* case. (See 5 Legal News, p. 330.)

When the operation of laws clashes, other questions will arise, and then we shall have to go back to the doctrine laid down in *Belisle v. L'Union St. Jacques*, to the effect that, legislation may be circumscribed by the exercise of a higher legislative authority. We take it this is the idea conveyed by Lord Selborne's argument in that case. (20 L. C. J. p. 20 and specially p. 47.)

Notwithstanding the reiteration of the recommendation that "in performing the difficult duty of determining such questions, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand," their Lordships lay down a general principle of some value. They say: "that subjects which in one aspect and for one purpose fall within Sect. 92, may in another aspect, and for another purpose, fall within Sect. 91."

We regret their Lordships should have passed upon the point as to the power to impose hard labour, which they admit, "was not raised on the rule nisi for the *certiorari*, nor is it to be found amongst the reasons against the appeal to the Appellate Court in Ontario." In another number we purpose to examine this *obiter dictum*.

R.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, December 31, 1883.

Before RAINVILLE, J.

LA CITÉ DE MONTRÉAL v. WYLLIE et vir.

Taxes—Exemption—Educational Institution—
41 Vic., c. 6, s. 28.

A school for the education of young ladies, kept by private persons, and not under public control, is not an "educational institution" within the exemption of 41 Vict. (Que.) cap. 6, s. 28.

PER CURIAM. La Corporation de Montréal réclame de la défenderesse une somme de \$440.80, pour taxes imposées sur une propriété appartenant à la défenderesse, pour les années 1878, 1879 et 1880.

La défenderesse ne nie pas qu'elle soit propriétaire, mais elle allègue que sa propriété est exempte de taxes, en autant que pendant tout l'espace de temps pour lequel les taxes sont réclamées, sa propriété a été exclusivement employée aux fins d'éducation; que c'était en réalité une maison d'éducation (educational institution), et qu'elle n'a reçu aucune subvention de la demanderesse.

Les faits ne sont pas contestés, et il est admis par les parties que la propriété mentionnée en la déclaration sur laquelle les taxes sont réclamées, a été occupée et employée pendant tout le temps pour lequel les taxes sont réclamées comme maison de pension et d'école de jour pour les jeunes filles, et maintenue par la défenderesse qui y employait plusieurs institutrices pour l'enseignement, et qu'en moyenne quatre-vingt-cinq élèves fréquentaient cette institution annuellement; que cette institution n'a jamais reçu de subvention de la Corporation demanderesse; en un mot, que si la dite institution n'est pas une maison d'éducation (educational institution) sous l'acte 41 Vict., ch. 6. (Q.) jugement doit être rendu en faveur de la demanderesse, sinon l'action doit être renvoyée.

Il ne s'agit donc, en cette cause, que d'interpréter l'acte sur lequel est basée la prétention de la défenderesse.

Voici les termes de cette disposition :

" Toutes maisons d'éducation qui ne reçoivent aucune subvention de la Corporation ou Municipalité où elles sont situées ainsi que les terrains sur lesquels elles sont érigées et leurs dépendances, seront exemptes des cotisations municipales et scolaires, quel que soit l'acte ou charte en vertu duquel ces cotisations sont imposées, et ce, nonobstant toutes dispositions contraires."

Le texte, en langue anglaise, rend les expressions : "*Toutes maisons d'éducation*" par "*every educational institution*."

Cette disposition est assez étrange : elle est donnée comme devant être ajoutée à la sect. 77, ch. 15 des S. R. B. C., lequel n'a trait qu'aux écoles. La § 2 de cette section 77 exemptait

des taxes imposées en vertu de cet acte (c'est-à-dire des taxes scolaires) " tous les bâtiments " consacrés à l'éducation ou au culte religieux, " presbytères, et toutes institutions charitables ou hôpitaux incorporés par acte du " parlement, et le terrain sur lequel ils sont " érigés." "*All buildings set apart for purposes of education, or of religious worship.*"

Il ne s'agit dans ce statut que de taxes scolaires : comment dans un amendement ajouté à cet acte, a-t-on introduit une disposition relative à l'exemption de taxes municipales ?

Cependant là n'est pas la question : il s'agit seulement de déterminer si sous le nom de "*Maisons d'éducation*," "*Educational Institution*," on doit comprendre les maisons d'éducation privée, "*private schools*."

La question ne laisse pas de présenter quelques difficultés : car on a greffé sur une loi qui n'avait trait qu'à l'exemption des taxes scolaires une disposition qui exempte des taxes municipales, et l'on s'est servi pour déterminer les propriétés et choses que l'on entendait exempter de taxes, d'expressions différentes de celles que le législateur avait employées dans la loi originaire. Dans cette première loi (S. R. B. C., ch. 15, s. 77) le législateur s'était servi des expressions : " tous les " bâtiments consacrés à l'éducation " : " all " buildings set apart for purposes of education," et dans la s. 26 du ch. 6 de 41 Vict., on emploie les mots : " Toutes maisons d'éducation " : " every educational institution " : a-t-on voulu par là étendre les dispositions du statut originaire ? A-t-on voulu comprendre d'autres propriétés ou institutions que celles que comprenait ce statut ? Puis on n'a aucune définition des expressions employées par le législateur.

Et, dit la défenderesse : voici une maison qui est exclusivement employée pour les fins de l'éducation : un grand nombre de maîtres y enseignent, et cent personnes y reçoivent l'instruction : est-ce que ce n'est pas là une maison d'éducation ? *An educational institution ?*

Et prenons pour exemple le collège de Sorel, qu'un M. Lyall, je crois, vient d'acquérir : ce collège peut contenir 200 élèves, et est, si je ne me trompe, exclusivement occupé par des élèves et des professeurs qui donnent une éducation complète : n'est-ce pas là une mai-

son d'éducation ? *An educational institution ?*

Et parce que ces institutions sont privées, appartiennent à un particulier, n'ont-elles pas autant de droits qu'une institution semblable qui serait sous le contrôle d'une corporation ?

Sans doute, et ces motifs me sembleraient très-puissants en législation. Mais sont-ils bien fondés en loi ? Là est la question.

Il est assez difficile de trouver des autorités et surtout des précédents sur le point : aux Etats-Unis, chaque Etat a sa législation particulière sur les exemptions de taxes et chaque législature a employé des termes différents.

La loi qui me paraît le plus ressembler à la nôtre, est celle de l'Etat de New-York : elle est dans les termes suivants :

"The following property shall be exempt from taxation :

"40. Every building erected for the use of a college, incorporated academy, or other Seminary of learning, every school-house . . ."

Sous l'opération de cette loi on a maintenu que :

"Exemptions from taxation of educational property are held not to include private schools, nor the property devoted to their use."

Hilliard on Taxation, Ch. 3, § 31.

Les tribunaux ont aussi décidé en ce sens.

3 Sandford Rep. p. 409.—*Clegaray v. Jenkins*.

Le juge Paine en rendant jugement, s'exprime dans les termes suivants :

"It is urged on behalf of the plaintiff, that the premises are a seminary of learning, within the meaning of this statute. It is very questionable, however, to say the least, whether upon a just construction of it, boarding-schools of this description, are comprehended within its letter or spirit.

"This school was established by private enterprise, is under no legal or public control, and is no more of a public character than any boarding-house, or other private property used for the accommodation of the public. On the other hand the institutions among which seminaries of learning are classed in this statute, are not merely of a public character, and under the management and control of the public, but are incorporated and endowed by the State.

"The clause is : 'Every building erected for the use of a college, incorporated academy,

or other seminary of learning.' The maxim *noscet a sociis* appears to be applicable here, and to limit the exemption from taxation to such seminaries alone as are incorporated. The expression was, no doubt, intended, such incorporated institutions of this description, as might not be properly called colleges or academies.

"Neither does it appear to us that the school in question is any more within the spirit than the letter of the statute.

"We certainly do not mean to detract from the great responsibility and usefulness of this and similar schools : but taxation is designed to be an equal burden upon all : and if any inequality is allowed to exist, it is supposed to be in favor of the poor rather than of the rich. Boarding-schools, however, are not within the reach of the poor.

"Their children live in such accommodation as can be provided for them at home, and are taught at schools that are common to all, and which are expressly exempted from taxation. If boarding-schools, therefore, were exempted from taxation, it would be exclusively for the benefit of the rich."

3 Sandford Rep. p. 413 et seq.

Une décision dans le même sens a été rendue par la Cour d'Appel de l'Etat de New-York, en 1855.

3 N. Y. Rep. Kerman, p. 220.

So a grammar school kept by a person at his own risk and on his own account, is not "a college, academy or seminary" within the exemption of the (N. Y.) tax act of 1851.

Hilliard, on Taxation.—Ch. 3, § 31, p. 88.

But buildings erected, kept, and appropriated for the use of a literary and scientific institution, and in which a corps of teachers has been engaged in teaching pupils in all the branches of education usually taught at colleges, are exempt from taxation under the (Ind.) act of 1861, although the institution is conducted on private account and the earnings are applied to the personal benefit of the individual proprietor.

Hilliard loc. cit. Et il cite 24 Ind. R. 391. Mais il ne cite pas les termes de l'acte de 1861.

Les termes dont se sert notre statut : "Toutes maisons d'éducation" ; "*Every educational institution*," me semblent indiquer

que le législateur n'entendait inclure que les institutions publiques et non des institutions privées. Les mots indiquent quelque chose de permanent et qui ne doit pas prendre fin suivant le caprice ou la volonté du propriétaire.

La défenderesse est donc mal fondée, et la demanderesse doit avoir jugement.

The judgment is as follows. —

“ La cour, etc....

“ Attendu que la demanderesse réclame de la défenderesse la somme de \$440.80, étant pour taxes municipales pour les années 1878, 1879 et 1880, les dites taxes étant imposées sur une propriété située dans le quartier St. Antoine et appartenant à la dite défenderesse, et pour intérêt sur les dites taxes à compter du 1er novembre de l'année où elles sont devenus dues respectivement jusqu'au 23 février 1881;

“ Attendu que la dite défenderesse a plaidé que la propriété sur laquelle les dites taxes ont été imposées a été, durant le temps pour lequel les dites taxes sont réclamées, exclusivement occupée par la défenderesse comme maison d'éducation (educational institution) avec ses dépendances, pour l'éducation des filles, et que la dite maison d'éducation n'a reçu aucune subvention de la Corporation demanderesse, et qu'elle est en conséquence exempte des taxes municipales ou scolaires;

“ Attendu que les parties ont admis que la propriété sur laquelle les dites taxes sont réclamées a été occupée pendant tout le temps mentionné en la déclaration comme maison de pension privée et école privée de jour (day school) pour les filles; que la défenderesse employait pendant ce temps plusieurs maîtresses et qu'on y enseignait en moyenne à quatre-vingt-cinq jeunes filles par année; que la dite institution n'a jamais reçu aucune subvention de la demanderesse; et que la seule question est de savoir si la dite institution est une maison d'éducation aux termes de la section 26 de l'acte de Québec 41 Vict., chap. 6;

“ Considérant que les expressions dont s'est servi le statut, impliquent l'idée que les maisons d'éducation (educational institution) sont des institutions d'un caractère permanent et fondées dans un intérêt public, et sous le contrôle de l'autorité, et non des ins-

tutions privées, et qu'en conséquence les lieux occupés par la défenderesse ne sont pas exempts de taxes;

“ Déboute la défenderesse de son plaidoyer, et la condamne à payer à la demanderesse la dite somme de \$440.80, avec intérêt et les dépens.”

R. Roy, Q.C., for the plaintiff.

Kerr & Carter for the defendant.*

CIRCUIT COURT.

MONTREAL, December 29, 1883.

Before TORRANCE, J.

LAPORTE V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Contract — Mandate — Responsibility of mandator — C.C. 1730.

The plaintiff, a workman, was engaged by contractors for the construction of a railway.

The railway company acted as bankers for the contractors, and paid the wages of the workmen, cost of transport to the place where they were engaged, &c. Held, that the company were the real principals, and they had given the plaintiff reasonable cause for believing that the contractors were their agents, and therefore the company were liable for a breach of the contract.

The demand was for damages for breach of a contract of hiring. Plaintiff said that about the 19th October, he was hired by the agents of defendant to work on their railway at the rate of \$3 per day; that he was to be employed at least six months; that in pursuance of the agreement, he went to Lake Nepigon, but the defendant refused to employ him; that he was retained by defendant from 19th October to 9th November doing nothing and he claims 20 days at \$3 per day, equal to \$60; that he further claimed from them \$6.50, disbursed by him for food; that he had a further right to claim damages for violation of the contract made for six months—for trouble, anxiety, sufferings, loss of time and money, which he reduced to \$30, in all \$96.50.

The defendants denied the contract and breach; they said they offered \$1.75 and \$2.00 and never refused work; that they paid travelling expenses and board of a large number of persons who pretended to desire to work for them.

PER CURIAM. The evidence shows that the defendants or their contractors wanted large numbers of laborers. They were hired by divers sub-agents. Chief of these sub-agents was one Talbot, who took his orders from Mr. William Smellie, the chief agent of the Contractors—a foreign Corporation known as the North American Contracting Company. A gang of 430 men went with plaintiff on the 19th October, under charge of Augustin Lepage. Lepage told the men that the contractors hired, but the company, defendants, paid them. The defendants were the bankers, and paid for the railroad tickets and transport and board to Lake Superior. When the men arrived at their destination, the agent there of the contractors, John Ross, was taken by surprise, was disconcerted, and could not say that he would have work for them, and upon reflection said that he would employ 50 on the Monday morning, and probably have occupation for the entire number within 15 days. Plaintiff offered his services on Saturday the 27th, and it is impossible to say that they were accepted by Mr. Ross, though he did the best he could under the circumstances. The plaintiff then returned to Montreal and made the present reclamation. Did the agents bind their principals though they exceeded their powers and their instructions;—for the principals say that they did not promise more than \$1.75 and \$2.00 for earth excavation and rock excavation, and here the demand is for the wages of a blacksmith, C.C. 1730. The man hired as a blacksmith, and would have earned the wages of a blacksmith with the contractors if competent for his work, and there is no proof of incompetency. Plaintiff was justified in believing so, seeing the heavy expenditure made for the contractors, the payment of the men's board and their passage-money to the Lake.

Next, is there anything in the objection that the contract was with the foreign contractors, the North American Contracting Company? Unhesitatingly not. The general rule obtains that agents or factors, acting for merchants resident in a foreign country, are held personally liable on contracts made by them for their employers: *Story—Agency*, §288, and here the real principals were the defendants who supplied the money, and who

employed the contractors. I therefore adjudge the defendants to be liable. The damages are estimated as follows: Plaintiff was away 20 days: 11 days' wages from time of arrival at Lake Nepigon, beginning on the 29th October till the 9th November, \$33; 9 days which I allow at \$2, or \$18, from the 19th to the 28th October, inclusive; 6 days more are allowed after his return at \$2 per day, or \$12; and \$9 allowed for his sufferings, making in all \$72, but from this is deducted \$10, board money, which should come out of his wages. Plaintiff will therefore have judgment for \$62 and costs.

L. O. David for plaintiff.

H. Abbott and *C. A. Geoffrion* for defendant.

SUPERIOR COURT.

MONTREAL, January 19, 1884.

Before PAPINHAU, J.

PAUZÉ *es qual.* v. *SÉNÉGAL.*

Obligation—Acceptance—Insolvency.

A creditor received certain railway bonds as collateral security for notes of his debtor. In a suit to recover the bonds, brought by the curator to the debtor's vacant succession, the creditor pleaded that the debtor had agreed to transfer the bonds to one G. for a price named, and that G. had assigned his rights to the defendant. Held, (1) that there being no evidence that the obligation was accepted by G. prior to the insolvency or death of the debtor (pledgor), it could not be urged as a defence to the action. (2) That in default to return the bonds the defendant was liable for the par value.

The judgment is as follows:

"La Cour, etc.

"Considérant que le demandeur ès-qualité de curateur à la succession de feu John Henry Pangman, décédé le onze de novembre 1880, réclame du défendeur cinquante-quatre débetures de la Compagnie du Chemin de Fer des Laurentides, de \$500 chaque, qui ont été déposées le 31 janvier 1880, entre les mains du dit défendeur pour sureté collatérale du paiement de deux billets consentis par le dit feu J. H. Pangman au défendeur, l'un de \$1000 payable dans dix mois de la dite date, et l'autre de \$1000 payable dans douze mois de la même date ;

“ Considérant que le demandeur a prouvé toutes les allégations de sa demande, et spécialement que le 6 avril 1882, avant la présente action, il a offert au défendeur le montant en capital des dits billets et les intérêts alors échus sur iceux, formant en tout la somme de \$2,152, afin de se faire remettre les dits deux billets et les dites débentures, et que le défendeur refuse de les remettre ;

“ Considérant que les dites offres ont été renouvelées par le demandeur et que le montant a été consigné en cour avec la demande ;

“ Considérant que le défendeur a d'abord plaidé qu'il avait acquis toutes les dites débentures du dit feu John Henry Pangman en échange des dits deux billets qu'il avait remis à ce dernier sans avoir retiré le reçu donné par lui au dit Pangman pour les dites débentures, et que le défendeur n'a aucunement prouvé ce premier plaidoyer ;

“ Considérant que le défendeur a plaidé par d'autres exceptions que Pangman s'était obligé, le 13 de septembre 1878, à céder et remettre au nommé N. H. Greene, \$24,000 des dites débentures pour \$1,400, que le dit Greene avait dûment accepté cette obligation, et l'avait ensuite cédée au défendeur, et que ce dernier était créancier du dit J. H. Pangman et de sa succession au montant des diverses sommes énumérées dans ses défenses, et qu'il était bien fondé à les offrir en paiement de la dite somme de \$1,400, pour acquérir les dites débentures au montant de \$24,000 que Greene avait le droit d'acquérir, et en compensation de la valeur des autres débentures ;

“ Considérant que le défendeur n'a pas prouvé ses défenses ;

“ Considérant spécialement qu'il n'a pas prouvé que le dit Greene eût accepté avant la mort du dit Pangman, l'obligation que ce dernier s'était déclaré prêt à remplir, de céder et remettre au dit Greene pour \$1,400, \$24,000 des dites débentures mentionnées dans l'écrit sous seing privé allégué par le défendeur comme étant daté du 13 de septembre 1878 ;

“ Considérant que cette acceptation ne pouvait pas être utilement faite par Greene ni par le défendeur après la mort du dit J. H. Pangman ;

“ Considérant que cette acceptation ne pouvait pas se faire valablement non plus après

que le dit Pangman fût devenu notoirement insolvable, comme le défendeur savait qu'il l'était au temps de son décès ;

“ Considérant que l'original du dit actessous seing privé n'a pas été produit en cour qu'après la clôture de l'enquête en cette cause et sur l'ordre donné par la cour en date du 2 de novembre 1883 ;

“ Considérant que la créance du demandeur es-qualité pour se faire remettre les dites 54 débentures données en gage au défendeur, ne peut pas être compensée légalement par les prétendues créances du défendeur contre la succession Pangman, et que la succession du dit Pangman est restée propriétaire du gage donné ;

“ Considérant que le défendeur n'a pas prouvé que les débentures que le dit Pangman s'était obligé de céder et remettre à Greene fussent celles, ni même une partie de celles que Pangman avait données en gage au défendeur ;

“ Considérant que toutes les défenses du défendeur sont mal fondées en droit aussi bien qu'en fait ;

“ La cour les renvoie avec dépens, et déclare bonnes et valables les offres et la consignation faites par le demandeur en cette instance au greffe de la cour, sujettes à la condition de remise par le défendeur au demandeur des dits deux billets et des 54 débentures en question ; déclare le demandeur es-qualité en droit d'avoir la remise et possession des dites débentures revendiquées ; condamne le défendeur à remettre au demandeur sous quinze jours de la date des présentes 54 débentures de \$500 chacune, de la Compagnie du Chemin de Fer des Laurentides, et, à défaut par le défendeur de ce faire, dans le dit délai, et ce dit délai expiré, la cour le condamne à payer au demandeur la somme de \$27,000, valeur nominale des dites débentures, avec intérêt sur icelle à compter du 8 d'avril 1882, jour d'assignation en cette cause, et les dépens distracts à maître Bonin, avocat du demandeur ; sur laquelle somme de \$27,000 devra être préalablement déduite celle de \$2,152, montant des deux billets en question, consentis par le dit J. H. Pangman en faveur du dit défendeur L. A. Senécal, en date du 31 de janvier 1880, et des intérêts accrus sur iceux depuis leur échéance respec-

tive jusqu'à la date des offres réelles faites au défendeur le six d'avril 1882, par le ministère de Mtre L. N. Dumouchel, notaire, laissant une balance de \$24,848, avec intérêt, etc.

Bonin, for the plaintiff.

Lacoste & Co., for the defendant.

SUPERIOR COURT.

MONTREAL, November 30, 1883.

Before JOHNSON, J.

GRAVEL v. HUGHES *es qual.*

Trespass—Responsibility of employer for fault of person under his control.—C. C. 1054.

An employer or parent is responsible for a trespass committed by his children or by persons employed by him or under his control, where he fails to establish that he was unable to prevent the act.

PER CURIAM. The defendant is sued personally and as curatrix to her interdicted husband, for a trespass committed by her and her servants on certain lots of land possessed by the plaintiff under permission of the owners, and used as grazing land for his cows, he being a milkman living near the city. The defendant answers the suit by alleging that she also had possession, and under a permission of the same kind, of a number of lots in the same locality, and which were not divided or distinguishable from those used by the plaintiff.

The difficulty in the case is to ascertain precisely what was possessed by the plaintiff, and which he had an exclusive right to use as grazing land. These lots are numbered, and witnesses who are neighbors, and well acquainted with the place, were heard before me, and proved to my satisfaction that the defendant, through her sons, committed the trespass complained of by driving off plaintiff's cows and putting their own cows there. It was urged that the evidence did not show the trespass by the sons to have been authorized by the mother; but there can be no doubt that the sons who lived with their mother, had no other interest or connection with the matter but as her servants, and under Art. 1054, C. C., she is responsible, unless she proves that she could not prevent them. Now, so far from proving anything of that sort, it is shown here, and not contradicted, that when she was notified by the plaintiff of his exclusive right to the grazing, she replied by assaulting him, and

the whole case not only repels the idea of the boys having acted on behalf of any other than their mother, but she and she alone is the person who pretended to have any counter right to that of the plaintiff. She had a permission, no doubt, at one time to use some of these lots from one Jobin, but none of Jobin's lots were in the limits fenced by the plaintiff. On the whole facts therefore I find for the plaintiff.

As to the damages, there is some uncertainty as to the number of cows that were driven off the land, and the time the plaintiff was deprived of the use of it. One hundred and fifty dollars are asked as for the loss of milk from ten cows; on the other hand, it is sworn that the place could not have fed more than three cows. It is certain, however, that in a way it did feed or half feed more than that. I give \$50 damages, and costs as of action brought.

Duhamel & Rainville for plaintiff.

E. Roy for defendant.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before TORRANCE, DOHERTY and LORANGER, JJ.

DUBUQUE v. DUBUQUE.

Voluntary deposit—Evidence—Judicial admission.

An admission by the defendant, under oath, that he received a voluntary deposit, but had delivered it as requested, cannot be divided; and verbal evidence is not admissible to contradict the accessory statement of delivery, in a case where proof of the deposit could not be made by testimony.

The judgment inscribed in Review was rendered by the Superior Court, Montreal, Rainville, J., April 30, 1883.

The action was by one brother against another, to recover the sum of \$125 alleged to have been given by plaintiff to defendant to be delivered to their father, Julien Dubuque. The defendant admitted under oath that he had received the money, but had delivered it as requested. The plaintiff then produced the father as a witness, and asked him if he had received the money. The question was objected to and the objection maintained, and there being no further evidence the action was dismissed.

TORRANCE, J. There is no error here. 30 Demolombe, No. 532, gives this very case. Any other doctrine would be extremely dangerous. If the defendant were an unfaithful depositary, there is no legal proof of it against his statement, which cannot be here divided.

Judgment confirmed.

Duhamel & Rainville for plaintiff.

Robidoux & Co., and *Pagnuelo*, Q.C., for the defendant.

The Legal News.

VOL. VII. FEBRUARY 2, 1884. No. 5.

A NAIVE EXPEDIENT.

One of the most curious suggestions made for the relief of the New York Court of Appeals emanates from a Mr. Gebhard, and appears in a communication to the *Albany Law Journal*. It is—Codification!—"A hastily prepared Code," says Mr. Gebhard, "would at least let us know what the law is; when we know what it is, we have removed the necessity of asking the Court to tell us, and to that extent lessened the burdens of the judges." It is refreshing to meet with such childlike faith. In this part of Canada we have been enjoying the advantages of a Code for seventeen years—not "a hastily prepared Code," but one compiled with great deliberation by jurists of eminent standing and long experience; but we do not think the necessity has been removed of asking the Court to tell us what the law is, nor have the burdens of our Court of Appeal been sensibly affected by its existence. In fact, we cannot imagine anything that would be more fruitful in litigation than "a hastily prepared Code." If Mr. Gebhard's suggestion were acted upon, we fancy some of his clients would soon be inclined to spell in a different way the epithet by which we have described his scheme.

THAT STRANGE PORTRAIT.

The *American Law Review* candidly discloses the sources of its information respecting Canadian affairs. It was gathered "from the stories told by Canadian *émigrés*, of whom there are a good number in this country, and whose ranks are receiving daily accessions. These *émigrés* are among our very best citizens." Our contemporary goes on to state that one of them, who migrated to St. Louis seven years ago, has prospered so mightily that "he is now achieving distinction as a legal author." Another, from Nova Scotia, has been for

many years a prominent figure in public affairs, and has been "a Senator of the United States!" He might possibly, adds the *Law Review*, have become a Justice of the Peace in Nova Scotia!

These are more startling sources of information than we imagined. Twenty, or ten, or even seven years ago, may be considered ancient history as to many branches of Canadian affairs. The stories of the *émigrés* are as accurate as the old maps of the British Provinces which are in vogue in some New England schools. And, because Canadians have prospered abroad is it to be inferred that they would not have succeeded at home? How will this logic work? Our cities are full of American *émigrés* from Vermont, from New Hampshire, Massachusetts and other States. Many of them have prospered and grown rich. Some of them are counted among "our best citizens." As well might we contend that Mr. Blank, from Massachusetts, instead of becoming a millionaire in Canada, would never have risen above the proprietorship of a peanut stand in Boston.

Our neighbours are great enough now to be able to dispense with unjust depreciation of Canada, for the purpose of exalting themselves. We are sensible that there is vast room for improvement among us in very many particulars. Our spirit is daily vexed by the presence of abuses which few have the courage to assail. But apparently, even in the eyes of the *Review*, society in the United States is far from immaculate; for, on another page, referring to the pardon of Mason, our contemporary candidly admits that "in Canada, society is better governed than in the United States."

LEGAL AUTHORSHIP.

After all, the lot of the Canadian gentleman in St. Louis, who is "achieving distinction as a legal author," does not seem to be one of unadulterated bliss, for in another article the *Law Review* laments over the small rewards of legal authorship. "There is no money, as a general rule," says our contemporary, "in writing original articles for legal periodicals"; and he adds: "It is believed that the *American Law Review*, under its former

"management, had a rule of paying two dollars per page for any articles which it would accept and publish. We think we are violating no confidence when we say that every cent which its publishers paid for articles was money lost." This is sad, but not surprising. Long judgments are generally useless as well as tedious, and long articles, unless by writers of world-wide reputation, are still less worthy of study. They cannot be cited as authority, and usually they have nothing but their own dulness to sustain them.

EARLY REPORTS.

Mr. Periard, law publisher, has in press a second edition of the volume of reports issued in Montreal thirty years ago by Mr. Justice Ramsay and the late Hon. L. S. Morin. These reports, which were the prelude to the establishment of the *Lower Canada Jurist*, have always been scarce, and for many years it has been very difficult to obtain a copy. The new edition has been revised by the learned judge, and will doubtless be appreciated by the profession.

HOLGE v. THE QUEEN.

The following peculiar reference to this case was inserted in the speech of the Lieutenant-Governor of Ontario, at the opening of the Legislature:—"You will be pleased to know that by a recent decision of the Judicial Committee of Her Majesty's Privy Council, the right of Provincial Legislatures to regulate the traffic in intoxicating drinks is placed beyond controversy. The judgments in this case and the Insurance case, and the decision that lands escheating to the Crown for want of heirs are the property of the province, taken in connection with the observations made by the learned judges in disposing of these cases, have had a reassuring effect on the public mind, by showing that the federal principle embodied in the British North America Act, and the autonomy it was intended to secure for the individual provinces, are likely to be safe in the hands of the court of final resort in constitutional questions." The Judicial Committee will, no doubt, be duly grateful for the compliment.

NOTES OF CASES.

PRIVY COUNCIL.

LONDON, Nov. 24, 1883.

Before LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH and SIR ARTHUR HOBHOUSE.

FRECHETTE, Appellant, and LA COMPAGNIE MANUFACTURIERE DE ST. HYACINTHE, Respondent.

Servitude—Water-course.

Where a person complains that the flow of water in a stream passing through his land has been obstructed by the act of the owner of the lower land, and the issue is raised that the plaintiff by his own works has altered the natural course of the stream, it is for him to prove, in order to make out a case entitling him to relief, that the servitude, as it existed previous to the changes made by himself, i.e. the natural or the established flow, has been interfered with by the lower proprietor.

The appeal was from a judgment of the Queen's Bench, Montreal. See 5 Legal News, p. 187.

PER CURIAM. The parties to this suit are owners of contiguous lands on the left bank of the River Yamaska; the plaintiffs, who are the respondents, being the owners of the upper lands, and the defendants, one of whom is the appellant, of the lower. The complaint is that the defendants have lately erected a barrier which prevents the water flowing in due course from off the land of the plaintiffs.

To understand the position of affairs it is convenient to refer to a plan put in by the defendants. Prior to the year 1878 matters stood as follows:—The whole river was traversed by a dyke marked A, which conducted the water to a mill (No. 4) belonging to the plaintiffs. After working that mill the water escaped into the natural channel of the river, and was not diverted again by the plaintiffs until nearly 100 yards below mill No. 4, where it reached the head of another dyke (Dyke No. 1), which was built near and nearly parallel to the left bank, and which caught a portion of the stream and carried it to another mill (Mill No. 1) belonging to the plaintiffs. The rest of the stream was caught by a dyke

(Dyke No. 3), the head of which was in mid-channel opposite Mill No. 4, and which conducted the water to the defendants' Mill No. 3. The water escaping through the tail race of Mill No. 1 also descended to Mill No. 3, but how it was used there, if used at all, does not clearly appear. Early in the year 1878 the plaintiffs carried Dyke No. 1 up the river to a point above the head of Dyke No. 3, and there connected it with a reef of shingle which extends to the right bank of the river. By this work the whole stream has been intercepted below Mill No. 4 and conducted to Mill No. 1, except when there is water enough to overflow the reef of shingle, and except so much as may leak through the dyke or through the reef. The defendant says that water has thus been taken away from the water-course formed by Dyke No. 3; and in the month of June, 1878, for the purpose as he alleges of recouping himself, he erected a barrier so as to prevent the escape of water from the tail race of Mill No. 1, and to form a head of water for a new mill which he built just below No. 3. The plaintiffs have also built a new mill (Mill No. 2) just below No. 1, and have excavated the bed of the river to receive their new wheels.

There has been considerable controversy whether the defendants' operations have impeded the working of Mill No. 1 or only that of Mill No. 2, but, in their Lordship's opinion, the controversy is not now material. The important fact is that the defendants' barrier has been found to bay back the water to a maximum depth of 22 inches at point A, which is the dividing line of the two properties. And the important question is, whether the plaintiffs are entitled to have the barriers so lowered that the water shall not be bayed back to any extent at all at Point A.

By the Civil Code of Quebec all rights to flowing water are classed under the head of servitudes; and by sect. 500 real servitudes are divided into three classes, according as they arise from the natural position of the property, from the law, or from the act of man. Servitudes arising from the law have nothing to do with the present question.

Sect. 501, which deals with servitudes of the first class, is as follows:—"Lands on a lower level are subject towards those on a higher level to receive such waters as flow

"from the latter naturally and without the agency of man. The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land."

Sect. 503 applies specially to rivers. It says, "He whose land borders on a running stream may make use of it as it passes for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs, saving the provisions contained in Cap. 51 of the Consolidated Statutes for Lower Canada, or other special enactments." "The same right" their Lordships take to mean the right to make use of the running stream as it passes the bordering land.

Unless then the provisions of the Code are limited by some special enactment, the plaintiffs have a right to say that the flow of water from their land shall not be impeded, so far as it is a natural flow, and independent of the agency of man. In this case the natural flow of the river has been altered by the agency of man for a long time, but an artificial flow may acquire as ample a right to protection as a natural flow.

The 3rd cap. of the 4th title of the Code treats of servitudes established by the act of man. Sect. 545 recognizes the right of every proprietor to subject his property to such servitudes as he may think proper consistently with public order. Sects. 549 and 550 are as follows:—

"No servitude can be established without a title; possession even immemorial is insufficient for that purpose."

"The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto."

"Title," which answers to "titre," means a written or express grant.

Now as regards the flow of water which existed prior to 1878, and which it may be convenient to call the established flow, it is not now disputed but that the plaintiffs became and were, just before the execution of their new works, rightfully possessed (whether by title or by some act of recognition does not clearly appear), of what, according to the

Code, is a servitude over the defendants' property. Their Lordships consider that the plaintiffs then had, at least as between them and the defendants, the same right to protection for the established flow as if it were the natural flow. The defendants might not raise any dam to obstruct the established flow.

The appellants' counsel contended strongly at the bar that the working of the plaintiffs' mill has not been impeded or only impeded to a slight extent, and that the defendants have been materially injured by the abstraction of water. But their Lordships did not think it necessary to hear the respondent's counsel on those points. For the right to resist interference with a natural flow of water, or a flow legally established, is independent of the actual user of the water. Neither would the plaintiffs' right to have the established flow protected be barred by the mere fact that the defendants may have been injured by deprivation of water owing to the extension of Dyke No. 1. That might give the defendants a right to sue for damages, or to remove the dyke; but it does not follow that they can interfere with the established flow from the plaintiffs' land.

The appellant's counsel also insisted strongly that the action is wrong in form, but their Lordships see no reason to differ from the two Quebec Courts on this point.

The question whether Chapter 51 of the Consolidated Statutes does not confine the plaintiffs to a single remedy, viz., that of pecuniary damages, is a more substantial one. There is certainly great difficulty in so construing the Code and the statute as to produce a clear and harmonious result for the whole. There is nothing on the face of the statute itself to limit the generality of the powers it appears to confer on riparian owners. It was stated at the bar that there had been a course of decision in Canada which had the effect of placing a limit on the general terms of the statute. But the only case cited, that which is stated in the respondent's factum filed 11th May, 1881, appears only to refer to the mode of ascertaining damages. And the Judges in the Lower Courts do not refer to any course of decision, while they entertain a great diversity of view as to the limits within which the

statute is to be construed. The Superior Court appears to think that the statute is no answer to actions founded on common right and on actual injury. Mr. Justice Ramsay, while impugning both the motives and the capacity of its framers, thinks it means nothing more than that if and when damages are sued for they shall be ascertained by referees. The rest of the Court in one passage expresses an opinion that the statute was not intended to operate against those who had turned running waters to use, and in another, that it was intended to operate only against landowners and not against millowners. It is difficult to find the foundation for any of these limitations. At the same time, their Lordships find it difficult to suppose that by the saving of the statute contained in Sect. 503, the Code intended to give no remedy whatever beyond pecuniary compensation for any violation of its rules. The question was very ably argued at the bar, but in the result their Lordships do not find it necessary to pronounce any opinion on it.

The substantial difficulty in the way of the plaintiffs is this: that they are seeking to establish a new and different servitude by the act of man without either grant or recognition; that they have not alleged or proved what was the precise servitude which existed prior to 1878; and that the decree which they have obtained proceeds on the assumption that the existing state of things is the natural state, or at least that there is identity between the state of things before and after the plaintiffs' operations of 1878. This is the difficulty to which the attention of their counsel was specially called, and to see how it stands it is necessary to examine the proceedings with some particularity.

In the declaration filed by the plaintiffs, they set forth their documents of title, and allege that they have had for upwards of 62 years the rights, privileges and water powers *actually used by them*. They pray for a declaration of those rights, for a declaration that the defendants have illegally disturbed the enjoyment of them, and for demolition of the defendants' barrier. It is clear then that, so far, the plaintiffs make no distinction between the existing flow of water and the established flow.

The defendants on their part rely on the alterations of 1878. They say in substance that the mischief is caused by the plaintiffs' own works executed below Mill No. 1 in the preceding spring and summer; that the extension of Dyke No. 1 has caught all the water and carried it down to Mill No. 1; that by collecting so large a quantity of water into the narrow space on the left bank, the plaintiffs have themselves to blame if at that point the water is more abundant than they like; and that they have no grant (*titre*) giving them a right so to use the river.

In replying to these defences the plaintiffs do not fall back on their right to the natural or the established flow of the water. As regards their works below Mill No. 1, they say that the defendants' allegations are false in fact. And as to all their recent operations, they say that their only object has been to preserve the water and conduct it from one of their mills to another, *as they have always done*.

At the wish of both parties experts were appointed by the Court to report upon instructions given to them by the Court. They were to state,—

1. The conditions of the localities and of the erections described in the writings of the parties, both before and after the said erections.
2. The works of the defendants.
3. The nature of those works, and whether they are calculated to injure the working of the water power used by the plaintiffs before they were completed.
4. What should be done so that each party may use the water without injury to the other.
5. What amount of damages, if any, should be paid by the defendants to the plaintiffs.

These instructions are not pointed to the effect of the plaintiffs' operations, but rather indicate that the only question is whether the flow existing at the time of the defendant's operations has been impeded.

In answer to the first and second questions the experts show the construction of the old and new mills to the effect hereinbefore stated, but they say nothing about the extension of Dyke No. 1, nor do they show what

was the former flow of the water, or the bed of the river, or in any other respect what was the state of the localities prior to the execution of the recent works of the plaintiffs. In answer to the third question they find that the defendants' new barrier bays back the water to the depth of about two feet at the boundary line, Point A. In answer to the fourth question they find the defendants ought to lower their barrier 22 inches, so as not to bay back the water at all over Point A. And they award \$100 for damage.

The parties then went into evidence, and the cause came on for hearing before Mr. Justice Sicotte, Judge of the Superior Court. That learned Judge gave the plaintiffs a decree in precise accordance with the opinion of the experts. The decree is founded on recitals showing that the plaintiffs have been in possession of a real right for a year and a day, using the upper waters and letting them escape over the land of the defendants. Then it states that the barrier raised by the defendants has obstructed the waters in their natural course such as it was formerly.

It is clear then that the Superior Court paid no attention to the alteration effected by the plaintiffs' works in 1878. The recital of possession for a year and a day is true of the prior state of things, but is not true of the existing state of things. Nor is the present course of the water its natural course, nor such as it was formerly.

On appeal to the Queen's Bench, there was a difference of opinion among the Judges. Mr. Justice Ramsay states very clearly the point of the defence which is now under discussion. He says, "The defendants answer that they have not stopped the natural flow of the water, but that the plaintiff has, by increasing his own works above, directed the waters of the river out of their natural course, and so created an artificial accumulation of water which can only escape through the tail race." He thinks this would be a good defence if it were not for the acquiescence or recognition of the defendants. But there is no evidence of such acquiescence in the plaintiffs' works of 1878. The evidence referred to by Mr. Justice Ramsay consists of two acts. First, the

construction by the defendants of Dyke No. 3, which was long prior to the extension of Dyke No. 1. Secondly, the construction of the works now complained of. But in the first place, though it is true that by their new works the defendants sought to take advantage of the new flow of water, they did so because their former flow was partially cut off. And in the second place an act can hardly be treated as acquiescence in favour of a person who has ever since been contending against it, and striving to destroy it. It is at the utmost acquiescence on condition of enjoying the thing acquiesced in, and if that condition is taken away, so is the acquiescence.

Having thus disposed of the defence founded on the extension of Dyke No. 1, Mr. Justice Ramsay addresses himself to the question of damage. He thinks that there is no sufficient evidence of damage, and would either dismiss the action or remit it for further report by experts.

The opinion of the rest of the Court was delivered by Mr. Justice Tessier. That learned Judge states the defendants' plea that the plaintiffs themselves have caused the mischief complained of, but he thinks it completely answered by the report of the experts in answer to the 3rd question. Now that question and answer relate only to the existing flow of water, and have absolutely no bearing on the prior question whether the plaintiffs are entitled to have that flow protected. Mr. Justice Tessier then quotes Art. 501 of the Code, and says that the Company have not added anything to the volume of the water by the hand of man, because they have not introduced any foreign water into the Yamaska. On these grounds the Court decides for the plaintiffs, and dismisses the appeal.

It is true, indeed, that the plaintiffs have not increased the whole volume of the Yamaska, but they may have accumulated the waters of that river into a small space, and so have increased their depth at the point where they complain of it, and have augmented the servitude they desire to enforce. This is the very thing which the Court of Queen's Bench appear to think would be material if only it had been done by intro-

ducing fresh water into the Yamaska, instead of being done by a readjustment of the waters of the Yamaska itself. That it must have been done to some extent seems evident from the plan, and the respondents' counsel so admitted. It results also from the evidence given by Bertrand and by Delisle, showing how the water which used to flow to the right of Dyke No. 1 now flows to the left. The plaintiffs have left the point untouched by evidence. Whether the difference is much or little has not been ascertained. By Sect. 501 of the Code, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. The plaintiffs have certainly accumulated the volume of the water, and have probably increased its depth in the narrow channel up to the dividing line. To that extent they are aggravating the servitude of the lower land, and to that extent at least they have no right to demand, as they do demand, a free course for the water sent down by them. That the matter is left in this uncertainty is the fault of the plaintiffs who are bound to allege and prove a case entitling them to relief. They come into Court insisting on their right to keep unobstructed the flow of water which they say has existed as it now is for more than 60 years. The issue is distinctly raised that the existing flow is not the ancient one; but they continue to insist that it is, and refuse to shape their case so as to try the question whether or no they are really entitled to some relief on the ground that the established flow had been interfered with, and to get that amount of relief. It is unsatisfactory to dispose of a case on such grounds, but their Lordships cannot see by what right the defendants are to be compelled to keep their dam so low that the whole volume of water, as accumulated and increased by the plaintiffs, shall run away unobstructed.

It is not easy to find decisions precisely applicable to such peculiar circumstances; but their Lordships have not been referred to and are not aware of any case in which the plaintiff has obtained relief in respect of any servitude except that to which he has clearly alleged and proved his right.

In *Saunders v. Newman*, 1 B. & A. 258, the plaintiff had acquired a prescriptive right to

an artificial flow of water. All he had done within recent times was to alter the construction of the wheel turned by the water. It was held that the defendant, a lower proprietor, had no right to obstruct the ancient flow; but it seems clear from the observations of the Judges that the decision would have been otherwise if the plaintiff's operations had substantially altered the flow of the water. Abbott, J., says, "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill. If he was, that would stop all improvements in machinery. If indeed the alterations made from time to time prejudice the right of the lower mill, the case would be different; but here the alteration is by no means injurious, for the old wheel drew more water than the new one."

Tapling v. Jones, 11 H. L., 290, was cited as an authority for the plaintiffs; but so far as it bears upon the point under discussion it favours the argument for the defendants. For the plaintiff in *Tapling v. Jones* succeeded in getting protection for nothing but his ancient light; those very rays of light to which he had acquired an indefeasible right. Lord Westbury says:—"In the present case an ancient window in the plaintiff's house has been preserved, and remained unaltered during all the alterations of the holding. . . . The appellants' wall, so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal obstruction." And Lord Chelmsford, in answering the argument that the alteration of windows had changed the character of the right so as to destroy it, says, "But it is not easy to comprehend how this effect can be produced by acts wholly unconnected with an ancient window which the owner has carefully retained in its original state."

It may be inferred from these judgments that, if the plaintiff in *Tapling v. Jones* had so mixed up his old lights with his new ones

that they could not be distinguished, he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights. In the case of an augmented flow of water the servitude of the lower proprietor is aggravated.

The result is that the plaintiffs have insisted on an enjoyment to which they have shown no legal title, and have not proved or even alleged any case for relief in respect of that enjoyment to which they may have had a title. Their lordships have anxiously considered whether it is possible usefully to remit the case to be tried on the true issues. They are, however, convinced that an attempt to do so will not save time or money, and that the litigation must follow the strict course. They will humbly advise Her Majesty to reverse the decrees below and to dismiss the action with costs. The costs of this appeal will follow the result.

Judgment reversed.

Henry Matthews, Q.C., and *Macleod Fullerton*, counsel for the Appellant.

Bompas, Q.C., and *Kenelm E. Digby*, counsel for the Respondents.

COUR SUPÉRIEURE.

MONTREAL, 29 Décembre 1883.

Coram PAPINEAU, J.

LEWIS et al. v. PRIMEAU et al.

Preuve testimoniale contre un acte authentique
— *Inscription en faux.*

JUGÉ:—*Que la Cour ne peut permettre à une partie à un acte authentique, de prouver par témoins la fausseté de la date de l'acte sans avoir recours à l'inscription en faux, que dans un seul cas, savoir, lorsqu'il s'agit d'un rapport d'huissier.*

L'action des demandeurs est basée sur un certain nombre de billets promissaires dont l'un est daté du 17 octobre 1882. Les défen-

deurs opposèrent à cette action un acte authentique de composition et décharge, daté à Québec, le 31 octobre 1882. Les demandeurs répondirent spécialement que cet acte n'avait pas été signé à la date qu'il porte, mais le 16 octobre 1882; puis, ils présentèrent à la Cour Supérieure une requête demandant à s'inscrire en faux contre le dit acte, pour prouver qu'il avait réellement été signé à cette dernière date. Sur cette requête, les défendeurs déclarèrent que l'acte en question avait été signé à diverses dates, par différents créanciers, à Montréal et à Québec, avec l'entente qu'il ne serait complété et n'aurait d'effet que lorsque tous les créanciers auraient signé, ce qui a eu lieu à Québec, à la date que porte l'acte; que, dans tous les cas, il a été signé par les demandeurs après le 17 octobre 1882, et qu'à cette fin les défendeurs entendent s'en prévaloir.

Les demandeurs, laissant alors de côté leur inscription en faux, firent une motion demandant à la Cour qu'il leur fût permis de prouver, par témoins, dans la cause principale, que le dit acte avait été signé à une autre date que celle qu'il porte, sur le principe que les défendeurs avaient admis, dans leur déclaration sur l'inscription en faux, que l'acte portait une date fautive quant aux demandeurs, ce qui avait détruit l'authenticité de l'acte.

Les défendeurs résistèrent, alléguant que les demandeurs n'avaient aucun intérêt, puisque la déclaration maintenait que l'acte avait été signé postérieurement au billet; que d'ailleurs les vœux des défendeurs, quelque puisse être leur portée, ne pouvaient servir que sur l'inscription en faux, et que rien ne justifiait la demande des demandeurs.

Le jugement est comme suit:—

"La Cour, après avoir entendu les parties, par leurs avocats respectifs, sur la motion produite le 3 décembre courant par les demandeurs, pour qu'il leur soit permis de prouver par témoin et sans recours à l'inscription de faux la date à laquelle une des parties à un acte notarié a signé cet acte devant le notaire, l'acte ayant été signé à Montréal et à Québec à des jours différents, et comportant avoir été signé en un seul jour; avoir examiné la procédure et délibéré;

"Considérant que le seul cas où, d'après le code de procédure, la Cour puisse permettre de procéder à prouver la fausseté d'un acte authentique est celui où il s'agit d'un rapport d'huissier, et que le cas présent est différent;

"Renvoie la dite motion sans frais."

Abbott, Taft & Abbott, pour les demandeurs.

Barnard, Beauchamp & Barnard, pour les défendeurs.

(J. J. B.)

SUPERIOR COURT.

MONTREAL, January 16, 1884.

Before MATHIEU, J.

THE BOLT & IRON CO. OF TORONTO v. GOUGEON.

Mandate—Authority of agent.

A deed of composition signed by a mandatary without any authority to accept a composition, is not binding on his principal.

In this case the plaintiff claimed from the defendant the sum of \$186.24 for goods and merchandise sold and delivered to the defendant. To this the defendant pleaded that on the 27th of March last he only owed the plaintiff the sum of \$135.55, and that at that time the defendant's creditors, among whom was the plaintiff, agreed to take sixty cents on the dollar for any amount due to it by the defendant, payable by promissory notes, endorsed by Leon Gougeon at four, eight, and twelve months from the 2nd April last, without interest; that he offered the notes, which the defendant refused to accept, and he deposited with his plea \$27.11, the amount of one of the notes matured and offered the other two notes, with a right to increase it in the event of the plaintiff proving that a larger sum was due, which the defendant did not admit.

PERR CURIAM. It appears that the deed of composition was signed on behalf of the plaintiff by C. E. Torrance, who himself states that he was not authorised to sign it, as does also the manager of the Company. Torrance was the broker or agent of the Company to sell their goods in Montreal. He took orders which were forwarded to Toronto, and the goods were sent thence to the purchasers. The statement of Torrance, that the manager of the Company had approved of his signing the deed of composition, cannot be admitted in evidence, inasmuch as this ratification cannot be the object of verbal evidence, and is, moreover, contradicted by the manager of the Company. Now it is not proved that Torrance had authority to represent the plaintiff in agreeing to the deed of composition, and it is the duty of anyone who contracts with a *mandataire* to satisfy himself of the sufficiency of his powers and to prove it. The plaintiff cannot therefore be held bound to submit to the said deed of composition, to which it was not a party; but it can only claim from the defendant the sum of \$135.55, as it is proved that the defendant did not receive the shipment of 14th March, 1883, for which sum with interest from the 19th of June last, judgment will go.

Macmaster, Hutchinson & Weir for plaintiff.
Augé & Lafortune for defendant.

The Legal News.

VOL. VII. FEBRUARY 9, 1884. No. 6.

PRIVILEGE OF COUNSEL.

The case of *Munster v. Lamb*, before the English Court of Appeal, to which we referred a short time ago (Vol. 6, p. 394), has been followed by a decision in the same sense by Mr. Justice Jetté in the Superior Court, at Montreal. In the case of *Gauthier v. St-Pierre*, a note of which will be found in the present issue, an advocate was sued for damages by a witness whom he openly charged with perjury, in a trial before the Recorder. The Montreal case was of a much milder type than the English one so far as the lawyer's words are concerned, for Mr. St-Pierre's client had specially instructed him to make the charge in the event of the witness stating a certain thing, viz, that his client, who was being tried for keeping a house of prostitution, had admitted to the witness that the charge was true. Mr. St-Pierre acted without malice, and the words spoken were connected with the case. There could be no doubt, therefore, that the case fell within the comprehensive rule laid down by the Master of the Rolls, who observed, in *Munster v. Lamb*: "It is better that the rule should be made large, even though it may be large enough to cover the case of a man who acts with malice and is guilty of misconduct."

Mr. Justice Jetté followed this decision, after establishing that the ancient as well as the modern law of France is precisely similar. So long as the words spoken are connected with the case in which the advocate is engaged, no action of damages will lie. It is for the presiding judge to restrain and rebuke counsel if they exceed the bounds of a fair defence and make use of language which is not inspired by a sense of duty.

DUPUY v. DUCONDU.

The decision of the Privy Council in this case, which will be found in the present issue, reverses the judgment of the majority of the

Supreme Court, and restores the judgment of the Superior Court, unanimously affirmed in appeal by the Court of Queen's Bench. One of the "unsatisfactory results" noted in Vol. 5, p. 105, is thus obliterated, for by the decision of the Supreme Court the winning side had but three judges to sustain it, while there were seven on the losing side. Now the judges stand ten to three in favor of the successful party.

The decision of the Supreme Court, it will be remembered, excited some remark. We may refer particularly to Vol. 5, pp. 84, 91, 105, 128 and 130. It will be observed that the position taken by "R" in the communications which appeared in our columns has been completely sustained by the final judgment. The Judicial Committee declare two things: first, that the sale of a Crown Timber license does not carry with it a warranty that there has been no prior concession which interferes with the vendor's rights; and secondly, that in this particular case, the deed of October 1866, by which two licenses, representing 50 miles of limits, were transferred to make up the deficit in the licenses previously sold, did not contain any warranty except the obligation to deliver the licenses themselves.

NEW PUBLICATIONS.

MONTREAL CONDENSED REPORTS, Second Edition, revised by Mr. Justice Ramsay.—
MONTREAL: A. Periard, Publisher.

This is the volume to which a brief reference was made last week. It embraces the reports and notes of cases contained in a work originally issued in 1854, under the editorial management of Messrs. T. K. Ramsay and L. S. Morin. The surviving Editor (Mr. Justice Ramsay) has revised the present edition, for the proprietor and publisher, Mr. Periard who has been induced to bring out a new edition by the fact that the work has long been out of print, and is still in much demand. The portion of the work known as the *Law Reporter*, consisting of articles and miscellaneous matters, has not been reproduced. Although the reports cover only 134 pages the number of cases is large, and many of them are still of considerable interest. Dur-

ing the period of its existence, this publication was the only work of the sort printed at Montreal, and the whole body of reports extant was quite insignificant. Since that time, however, as appears by a brief preface to the work contributed by Mr. Kirby, the number of volumes of provincial reports has been increased by 74.

The publisher has done his part well, the work being well printed and bound. The members of the profession will, no doubt, gladly avail themselves of the opportunity of adding to their libraries this valuable and interesting compilation, of which for many years it has been impossible to obtain a copy.

NOTES OF CASES.

COUR SUPERIEURE.

MONTREAL, 28 novembre 1883.

Coram MATHIEU, J.

BURY v. SILBERSTEIN.

Action pro socio—Demande dans un plaidoyer.

JUGÉ:—*Que l'on ne peut dans un plaidoyer à une action pro socio conclure à ce que le demandeur soit condamné à rendre compte ou à payer une somme d'argent, mais que cela doit se faire par demande incidente.*

L'action est *pro socio*, elle demande la dissolution de la société et à ce que le co-associé défendeur rende compte de son administration. Le demandeur conclut, en outre, à \$2,500 de dommages et à ce que la part du défendeur dans la société soit confisquée en sa faveur, le défendeur ayant, contrairement à l'acte de société, établi, à Montréal, un autre établissement semblable à celui de la société.

Le défendeur admet la dissolution de la société, accuse le demandeur d'avoir violé ses devoirs d'associé, et conclut au débouté de l'action, puis il demande à ce que le demandeur soit condamné à lui rendre un compte, et à lui payer une somme de \$2,000, montant du capital investi par lui dans la dite société.

A ce plaidoyer, le demandeur répondit en droit: 1o. par une réponse partielle, que le défendeur ne pouvait dans un plaidoyer lui demander un compte; 2o. par une autre réponse partielle, qu'il ne pouvait pas non plus demander dans son plaidoyer une condam-

nation pour une somme de deniers, ce qu'il aurait dû faire, si dans les cas il en avait le droit, par une demande séparée; 3o. par une réponse totale, que le plaidoyer n'était pas une réponse à l'action, que le défendeur à une action *pro socio*, s'il plaide affirmativement, ne peut que refuser ou se soumettre à rendre compte, ou plaider qu'il a déjà rendu compte.

A l'argument, le défendeur objecta que le demandeur n'avait pas indiqué spécialement les allégations du plaidoyer auxquelles il répondait en droit, mais ne les avait indiquées que généralement.

Le jugement est comme suit:

"La Cour, etc....

"Sur la première réponse en droit produite par le dit demandeur à l'encontre de cette partie du premier plaidoyer du dit défendeur, dans laquelle le dit défendeur allègue qu'il a droit de réclamer du demandeur un compte des affaires que le demandeur a pu faire pendant l'existence de la dite société, en dehors des affaires de la société elle-même, et à cette partie des conclusions du dit plaidoyer, dans laquelle le dit défendeur demande que le demandeur soit condamné à lui rendre compte des profits réalisés par le dit demandeur en dehors des affaires de la dite société, et qu'à défaut par le demandeur de rendre le dit compte il soit condamné à payer au défendeur la somme de \$5,000;

"Considérant que ces allégations du dit défendeur auxquelles la dite réponse en droit se rapporte ne sont pas faites dans une demande incidente, mais sont faites dans un plaidoyer tendant à faire renvoyer l'action du demandeur, et que dans une action intentée pour obtenir la dissolution d'une société ces allégations ne sont pas une bonne défense à l'action;

"Considérant que le défendeur n'offre pas non plus la somme réclamée en compensation des dommages réclamés par le demandeur; que la dite première réponse en droit du dit demandeur est bien fondée;

"A maintenu et maintient la dite première réponse en droit du dit demandeur, et a déclaré et déclare les allégations et les conclusions du dit premier plaidoyer du défendeur mentionnées dans la dite réponse en droit illégales et les rejette du dossier;

"Sur la deuxième réponse en droit du de-

mandeur à cette partie du premier plaidoyer du défendeur dans laquelle le défendeur allègue que sa mise dans les fonds de la dite société s'élevait à la somme de dix-sept cents à deux mille piastres, et à cette partie des conclusions par laquelle le défendeur demande que le dit demandeur soit condamné à payer au défendeur la somme de \$2,000.00 pour la valeur des effets par lui mis dans la société:

"Considérant qu'un défendeur ne peut obtenir une condamnation contre le demandeur si ce n'est par une demande incidente et que le défendeur n'a pas fait telle demande incidente, et qu'il ne demande pas non plus à offrir la somme qu'il réclame en compensation de la somme réclamée par le demandeur;

"Considérant en outre que le dit défendeur n'a pas le droit de demander que le demandeur soit condamné à lui payer en deniers la valeur de sa mise dans la dite société, mais qu'il aurait seulement droit au partage des biens de la dite société et au paiement de la balance lui revenant après ce partage;

"Considérant que les allégations et la partie des conclusions du dit premier plaidoyer du dit défendeur auxquelles se rapporte la dite réponse en droit sont illégales;

"A maintenu et maintient la dite deuxième réponse en droit au dit demandeur et a déclaré et déclare les dites allégations et conclusions auxquelles la dite réponse en droit se rapporte illégales et les rejette du dossier, et a condamné et condamne le dit défendeur à payer au dit demandeur les dépens d'une réponse en droit, lesquels dépens sont distraits à MM. Barnard, Beauchamp et Creighton, Avocats du demandeur;

"Sur la troisième réponse en droit du dit demandeur à tout le premier plaidoyer du dit défendeur;

"Considérant que si les allégations qui ne sont pas rejetées tel que ci-dessus mentionné, dans le dit plaidoyer du défendeur ne sont pas suffisantes pour faire renvoyer l'action, cependant elles peuvent avoir quelque influence sur le montant des dommages que le demandeur pourrait obtenir contre le défendeur;

"A ordonné et ordonne preuve avant faire

droit sur la dite troisième réponse en droit, dépens réservés."

Barnard, Beauchamp & Barnard, pour le demandeur.

Church, Chapleau, Hall & Atwater, pour le défendeur.

(J.J.B.)

SUPERIOR COURT.

MONTREAL, January 30, 1884.

Before TORRANCE, J.

CLENDINNEN V. EUARD.

Trade Mark—Prior use of design.

A person who copies the design of an article which has long been manufactured and in use in another country, and registers a trade-mark for the same in Canada under the Trade-Mark and Design Act of 1879, is not entitled to protection.

This was an action of damages against a dealer in stoves, for alleged infringement of a trade-mark and industrial design registered as the property of plaintiff. It was in evidence that this trade-mark and design had been copied by plaintiff from and were identical with a stove manufactured by a firm of Eddy, Corse & Co., of Troy, N. Y., and sold throughout the United States of America, plaintiff having procured patterns of the same from Eddy & Co.; that this trade-mark and design were applied to stoves, and known and sold in the United States for years previous to the registration in Canada, and plaintiff copied his design and trade-mark from the stoves of Eddy & Co. Further, previous to the registration by plaintiff, defendants had imported from Eddy & Co. a stove similar in design, and used as a pattern, from which the stoves complained of were made.

PER CURIAM. I do not find any right in plaintiff. He is not the proprietor intended to be protected by the Act of 1879. He has no rights as against defendant. The action is dismissed.

Robertson, Ritchie & Fleet, for plaintiff.

Greenshields, McCorkill & Guerin, for defd.

SUPERIOR COURT.

MONTREAL, JANUARY 30, 1884.

Before TORRANCE, J.

MARCHAND v. SNOWDON et al.

Capias—Probable cause.

The plaintiff was arrested on a capias, on the ground that he had refused to make any settlement of his debt; that he was about to sell his estate and to leave the country. It appeared that the plaintiff had called a meeting of his creditors and informed them of the proposed sale, to which the majority of those present agreed. Held, that there was not probable cause.

This was an action of damages for maliciously causing the arrest of plaintiff for a debt due by him of \$200. The capias issued on the 11th November, 1881, on the affidavit of one Cleghorn, the book-keeper of defendants. He deposed that he had reason to believe and did believe that plaintiff was immediately about to leave the late Province of Canada, with intent to defraud his creditors, and his reasons for the belief were that plaintiff had informed him that he was about to sell his estate and effects and to take up his abode in Montana, in the United States. The plaintiff was arrested on the 11th November, 1881, contested the capias, and it was quashed on the 8th February, 1882.

PER CURIAM. The evidence shows that plaintiff being in a strait, notified his creditors, and met them on the morning of the 11th November, and after explaining matters to the creditors, proposed selling his stock to one Desjardins. This was agreed to by those present. One Poitras attended the meeting for defendants, though he did not express any opinion, and says in his deposition that his principals, the defendants, expressly forbade his consenting to anything for them. Plaintiff gave his creditors to understand that he would go to the States in January. It appears that Poitras reported the meeting to the defendants and plaintiff's intention to leave in January. Defendants immediately directed their book-keeper Cleghorn to have the plaintiff arrested as a debtor on the eve of absconding. Cleghorn, examined as a witness in the capias suit, says,

from plaintiff never having stated that he would settle his account, and never having made any set time at which he was to settle, and from his conversation to the effect that he was going to leave the country, and from information that Cleghorn had, his assets would not cover his liabilities. These were the reasons for making the affidavit. Q. Are you quite sure that the petitioner (plaintiff) did not state the time at which he intended leaving this country to go to Montana? A. I know he did not state it to me. Q. Nor did he state it to any other of your informants to your knowledge? A. That I cannot state. Q. Well, they did not state to you that he had stated to them the time at which he was leaving? A. No. They did not state anything of the kind to me.

The conclusion of the Court is that the affidavit was made without probable cause for the arrest, and defendants, therefore, are liable in damages. These are assessed at the sum of \$200.

T. & C. C. Delorimier, for plaintiff.

H. L. Snowdon for defendants.

J. L. Morris, Counsel.

SUPERIOR COURT.

MONTREAL, JANUARY 31, 1884.

Before JETTE, J.

GAUTHIER v. ST. PIERRE.

Professional Privilege—Words spoken by counsel during trial.

No action lies against an advocate for words spoken by him in the discharge of his professional duty before the Court, unless the words complained of are foreign to the case in which he is at the time engaged.

On the 6th October, 1882, the defendant Mr. St. Pierre, a member of the Montreal Bar, was engaged before the Recorder in the defence of a woman charged with keeping a house of ill-fame. Gauthier, the plaintiff, was the principal witness for the prosecution. Before the trial came on Mr. St. Pierre was informed that Gauthier was circulating a statement to the effect that the accused had admitted her guilt to him. Entertaining some doubt as to the correctness of this state-

ment Mr. St. Pierre communicated with his client, who emphatically denied the report, and added, "If the witness makes such a statement on oath he will be perjuring himself, and I authorize you to make a declaration to this effect before the Court."

The case came on for trial, and Gauthier did depose that the accused kept a house of prostitution, and that she had admitted the fact to him. Thereupon Mr. St. Pierre exclaimed: "*Ce que vous dites là est un mensonge; vous vous parjurez; vous êtes un parjuré!*"

On this Gauthier brought the present action, claiming \$100 damages.

The defence was that the words were not used, but if they were, the defendant's privilege as counsel protected him; that what he said was stated in pursuance of instructions from his client.

PER CURIAM. Notwithstanding the defendant's denial, it is established in evidence that he said, "*parjure*," or, "*vous vous parjurez*." The Recorder made a note of the statement, and remarked to Mr. St. Pierre that he had no right to speak in that way. Other witnesses give the same version of what transpired. But the Recorder, though he considered the admission to be proved, gave the accused the benefit of the doubt, and discharged her.

The question is whether the defendant is liable to an action of damages for words spoken in the discharge of his professional duty. Grellet-Dumazeau, No. 884; Dareau, chap. 3, sec. 4, No. 4. The old French law allowed the advocate entire freedom in everything pertinent to the case, under the control of the presiding judge. Every Court has the right to check a lawyer if he indulges in too great license of expression.

The dispositions of the old French law are found in the modern law;—Grellet-Dumazeau, No. 887; Chassan, Délits et contraventions de la parole, No. 136. It is only where the slanderous expressions are foreign to the cause that an action lies.

The same principles prevail in England. In the case of *Rex v. Skinner*, more than a hundred years ago, Lord Mansfield laid down the rule in the clearest terms: "Neither party, witness, counsel, jury or judge can be put to answer, civilly or criminally, for

words spoken in office." In the recent case of *Munster v. Lamb*, the doctrine is re-affirmed in the most positive manner.

In the present case, the words of Mr. St. Pierre were not foreign to the cause which was being tried, and therefore they could not give rise to an action of damages.

The following is the text of the judgment:

"La Cour, etc....

"Considérant que le demandeur poursuit le défendeur, avocat du barreau de cette ville, lui réclamant \$100 de dommages-intérêts, à raison de certaines paroles injurieuses que le dit défendeur lui aurait adressées, le 6 octobre 1882, pendant une audience de la Cour du Recorder, dans une cause où le demandeur comparait comme témoin et pendant qu'il donnait sa déposition comme tel;

"Considérant que le défendeur a plaidé que les paroles qu'il a alors prononcées à l'adresse du demandeur, l'ont été dans l'exercice légitime de son droit professionnel, pour la défense des intérêts de la partie que représentait alors le défendeur et sur les instructions spéciales de sa cliente, et que par suite, il est protégé contre toute action telle que celle maintenant portée contre lui;

"Considérant que bien qu'il apparaisse en preuve, que le défendeur a prononcé, dans l'occasion en question, les paroles qui lui sont reprochées, il est constant néanmoins que ces paroles, loin d'être étrangères à la cause, s'y rapportaient au contraire directement; qu'elles ont été dites sincèrement et sans malice et d'après les instructions formelles de la partie que représentait le défendeur, et que, dans ces circonstances, l'abus de langage dont le défendeur est accusé n'était soumis qu'au contrôle exclusif de la Cour, devant laquelle il remplissait son ministère, et ne peut maintenant l'exposer à être recherché par action civile devant un autre tribunal;

"Considérant, en conséquence, que le défendeur est bien fondé à invoquer, dans l'espèce, le privilège et l'immunité que la loi accorde à l'avocat, pour la libre défense de son client;

"Maintient l'exception du défendeur et renvoie et déboute l'action du demandeur avec dépens."

Action dismissed.

Champagne & Cornellier, for plaintiff.

St-Pierre & Seillon, for defendant.

PRIVY COUNCIL.

LONDON, November 27, 1883.

Before SIR BARNES PEACOCK, SIR MONTAGUE SMITH, and SIR ARTHUR HOBHOUSE.

DUCONDU et al., Appellants, and DUPUY, Respondent.

Sale—Timber licenses—Deficiency—Warranty.

A person sold his right and title to thirteen Crown Timber licenses. He was unable to deliver two of the licenses. To make up the deficiency he assigned two other licenses representing fifty square miles of limits. The second deed contained a warranty against all disturbance. Held, (reversing the judgment of the Supreme Court of Canada, 5 L. N. 72,) that the vendor was not liable to make good a title to the limits covered by the thirteen licenses further than the licenses made a title to them, and that the two licenses assigned by the second deed must be taken exactly as the two missing licenses were taken, viz., as conveying only such right, title and interest as the vendor had obtained from the Crown, and that there was no guarantee against a deficiency by reason of a prior grant.

The appeal was from a judgment of the Supreme Court of Canada, noted in 5 L. N. 72. The case is also referred to, in its different stages, at p. 350 of vol. 3, and pp. 72, 84, 91, 105, 106, 128, 130 and 153 of vol. 5.

PER CURIAM. On the 10th July, 1858, Edward Scallon, who is the predecessor in title of the appellants, contracted with one Benjamin Peck, the predecessor in title of the respondent, to sell to him certain property called timber limits.

The nature of a timber limit is this:—Annual licenses are granted by the Commissioner of Crown Lands to take possession of certain areas of land, to cut timber within those areas or limits. There is an express provision in the statute that if any license is found to cover ground already occupied by a prior license the subsequent license shall to that extent be null and void.

Such being the nature of the property, Scallon contracted to sell all the right and title obtained by him from the Crown. The purchase money was to be paid by instal-

ments, and when the last instalment was paid the conveyance was to be completed by Scallon. The money was paid; and Scallon being dead, his heirs, the present appellants, executed a deed, dated the 16th March, 1865, for the purpose of completing the conveyance to Cushing, in whom Peck's interest was then vested. In that deed it is stated that they are acting in execution of the prior contract; and they convey and release, with a guarantee against disturbance, all the immovable property and rights which Scallon had promised. Then they proceed to describe it; and they describe it in precisely the same terms as are used in the contract of 1858. The property so described is said to be comprised in 13 different licenses, which purport to convey a title to an area of 256 miles.

Among those licenses are two, numbered 97 and 98, which purport to convey title each to an area of 25 miles on the Assumption River; and the heirs of Scallon declare that the licenses have been renewed up to that time by Peck and his representatives. It turned out that in point of fact Nos. 97 and 98 had not been renewed, and it seems doubtful whether they were in existence at the time of the contract of 1858. Mr. Fullarton has argued his case on the hypothesis, which he takes as most favorable to himself, that they were not in existence at that time.

On that discovery the parties come together again, and the heirs of Scallon agree to make good the loss accruing to the successors in title of Peck by the non-existence of licenses 97 and 98. The arrangement made by them is contained in a deed of the 22nd October, 1866, executed by one McConville, who for the present purpose is assumed to be the lawful agent of the appellants. The language used by the parties in that deed is, as stated in English, to the following effect:—After referring to the prior transactions, they say, "In virtue of that deed"—that is, the deed of 1858,—"Scallon was bound to sell "256 miles of limits for cutting wood on "Crown lands; and as there is found a "deficit of 50 miles to complete the said "quantity of 256 miles granted to Cushing, "McConville, in the name of his principals, "desiring to fill up the deficit which has "been found, has by these presents granted

"and conveyed, with warranty against all disturbances generally, whatsoever they may be, to Cushing, the said quantity of 50 miles of limits on the said River Assumption, described as follows in the English tongue."

The description is contained in two other licenses, Nos. 25 and 26. License 25 is in these terms:—"Commencing at the upper end and limit No. 94 on the southwest side of L'Assomption River, granted to late Edward Scallon, and extending five miles on said River and five miles back from its banks, making a limit of 25 square miles, not to interfere with limits granted or to be renewed in virtue of regulations." *Mutatis mutandis*, license 26 is in the same terms. The deed states that McConville has, for his principals, paid the sum of \$500 to Cushing, on account generally of all claims which Cushing may have against the heirs of Scallon, and Cushing further declares that by reason of this deed he has nothing to claim, for any cause or reason whatever, against the heirs of Scallon; and a general release is given. McConville on his part gives a general release to Cushing for all claims by the heirs of Scallon.

It is on that deed that the present question arises. The difficulty which has arisen is this: that when the grantee, Cushing, came to work on the limits contained in the licenses 25 and 26 he was stopped by a man of the name of Hall, who claimed to be possessed of the same land in virtue of a prior license from the Crown. There has been a great deal of controversy as to whether the interference by Hall has been properly proved in this suit; but for the purposes of the present decision all that part of the case is assumed in favor of the respondents. Cushing could not get the benefit of all the land described in licenses 25 and 26, by reason of a prior grant to Hall. Cushing accordingly, or his assignee, Dupuy, the present respondent, sues the heirs of Scallon upon the warranty which he alleges that they have given for 50 square miles of timber limits. The question is whether the appellants have given a warranty for those 50 miles of limits absolutely, or only a warranty for the licenses which purport to give a title to the 50 square miles. It is a question of very considerable

difficulty. The Courts in Montreal have taken one view, in favor of the appellants; and the majority of the Supreme Court has taken the other view, in favor of the respondent.

There has been a good deal of question, both in the Courts below, and at the bar here, whether it is proper to go behind the deed of October, 1866. It is quite plain what the course of a court of justice must be. In one sense we cannot go behind the deed of 1866; that is to say, the rights of the parties must be regulated by the construction of that deed, and of that deed alone. In another sense we have to go behind it, because the deed itself refers to prior transactions. It professes to be founded upon the liability arising out of those prior transactions; and a court cannot properly construe the deed without ascertaining what the position of the parties was at the time when they came to execute it. Now the position of the parties appears to their Lordships to be this: Scallon contracted to sell his right and title to the 13 licenses, which purport to contain 256 square miles. He was not liable to make good a title to the 256 square miles any further than the licenses themselves made a title to them. But he was liable to have and to deliver the licenses which he purported to sell. In point of fact he had not got two of those licenses, and when that fact is discovered his heirs come to make up the deficit, as they call it "*completer le deficit*," that is to say, to do that which Scallon was bound to do. At that time Scallon was bound to make good in some way the loss sustained by the non-existence of licenses 97 and 98.

What then do the parties do? They make up the deficit by assigning two other licenses. They call it, "50 miles of limits described as follows." Even taking the word "limits" to be an ambiguous term, their Lordships are of opinion that "limits described as follows" must be taken to indicate the thing which is sold according to the description which is given. Into that description is imported the condition that the license sold is not to interfere with limits granted or to be renewed in virtue of regulations. Therefore the two licenses which formed the subject of the assignment of 1866 are to be taken exactly

as the two missing licenses which form the subject of the contract of 1858 were taken, viz., as conveying only such right, title, and interest as the vendors had obtained from the Crown. Now the guarantee can only extend to the thing that is sold, the very subject of the assignment. If the licenses 25 and 26 were not forthcoming, or if there was any defect in the title of the heirs of Scallon to those licenses, the guarantee might have some operation; but the licenses are forthcoming and have been handed over, and there is no guarantee against a deficiency by reason of a prior grant.

The result is, that, assuming the respondent to be right in all the issues raised by him with respect to the breach of the alleged guarantee, their Lordships are of opinion that no guarantee exists to cover that alleged breach.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the Supreme Court be reversed, and the decrees of the lower Courts restored. The costs of the Appeal will follow the result.

S. Pagnuelo, Q. C., and Kenelm E. Digby for appellants.

F. L. Bique and M. Fullarton for respondents.

THE LATE MR. JUSTICE DAY.

Judge Day, intelligence of whose death has been received from England, left the bench so long ago, that he is remembered as a lawyer and judge by comparatively few of the present generation. His name is associated chiefly with the work of codification, he being one of the three commissioners originally named to prepare the draft of the Civil Code of Quebec. He was also engaged as a Commissioner in the matter of the Canadian Pacific Railway charges, and acted in a public capacity on one or two other occasions since his retirement from the bench. He enjoyed a fair reputation as a judge though but few of his decisions have been handed down to us. As a citizen as well as a judge Mr. Day was generally esteemed, and as Chancellor of McGill University he has taken some interest in educational matters.

GENERAL NOTES.

The vacancy on the Superior Court Bench at Rimouski, caused by the death of Mr. Justice Allyn, has been filled by the appointment of Mr. J. A. Mousseau, Q. C.

The morning papers state that since the conclusion of the trial of Arabi prayers have been offered on behalf of the Queen in mosques in Cairo and in the provinces of Egypt, Her Majesty being referred to as "the Mirror of Justice." It is curious to observe that this title is given to the Virgin Mary in some Roman Catholic litanies, she being addressed as "Speculum Justitie."—*Notes and Queries.*

Less than forty years ago we saw fugitive slaves arrested in the city of Chicago, at the instance of their masters. The black man's mouth was closed, he could not even testify in court against a white man. Last night we saw a jury of twelve men, of one of the courts of record, in the Central Restaurant, getting their supper in charge of Bailiff Baird, a colored man. He was their only attendant to and from the court.—*Chicago Legal News.*

Comte Duteau de Grand Pré, Deputy Clerk of Appeals at Montreal, died January 20th. The deceased had been employed in the appeal office during 36 years. He was of somewhat eccentric character, though methodical and punctual in the performance of his duties. A good many years ago, he was accustomed to take repose in a coffin which he kept in his bedchamber, but one day this peculiarity nearly proved fatal, the lid, which closed with a spring, dropping while he was reclining within, and he was nearly suffocated before assistance arrived. He then ceased to use the coffin as a couch, but retained it in his house up to the time of his death, when it served for his burial. His appearance and costume were even more remarkable than his habits. He might have figured in a masquerade as a mediæval rustic, with very little alteration of his ordinary get-up.

A communication in a Toronto journal contains the following table of judicial salaries paid in other colonies under responsible government:—

	Pop.	Chief Justice.	Puisne Justice.
Victoria.....	906,225	\$17,500	\$15,000
N. S. Wales.....	840,814	13,000	10,000
Queensland.....	248,255	12,500	10,000
S. Australia.....	303,195	10,000	8,500
New Zealand	517,707	8,500	7,500
Tasmania.....	122,479	7,500	6,000
Cape Colony.....	1,249,824	10,000	8,750
Natal.....	400,676	7,500	6,000

The salaries in the other colonies are as follows:

Jamaica.....	580,804	12,500	not given
British Guiana.....	257,473	12,500	7,500
Hong Kong.....	1,094,804	12,500	8,500
Straits Settlements.....	350,000	12,000	8,400
Ceylon.....	2,758,529	11,250	9,000
Windward Islands.....	285,000	10,000	not given
Fiji.....	12,500	10,000	do
Trinidad.....	153,128	9,000	6,000
Leeward Islands.....	118,000	7,500	6,000

The Legal News.

VOL. VII. FEBRUARY 16, 1884. No. 7.

HODGE v. THE QUEEN.

The people of Canada have exhibited great reserve in dealing with the B. N. A. Act, 1867. The tendency has been to avoid raising constitutional questions in our own courts, and during the sixteen years since the passing of that Act, in only fifteen cases have we sought the arbitrament of the Privy Council as to the meaning of the rules of our written constitution. This reserve is not the effect of indifference, but rather of a desire not to provoke hasty decrees, which, being rendered in unimportant matters, may not receive the attention the principle dealt with deserves. It will readily be admitted that there has been no reason to complain that the Judicial Committee has not given the most careful attention to these questions. In fact, the most perfect confidence exists in this country that "they decide each case as it arises as best they can"; but with all due respect for their opinions, the decisions they come to on these matters are of an importance too vital to us to permit of our accepting them otherwise than subject to the crucial test of scientific and historical criticism. It has been said, no jurisprudence can alter the terms of *Magna Charta*, and, in a like spirit, we must maintain, that no jurisprudence can be recognized which plainly misinterprets the great contract on which the Union of British North America has been based.

Having stated when, and how far we venture to demur to accept each decision of the Judicial Committee as conclusive authority in all similar cases for the future, we shall proceed to discuss, without reserve, two points to which recent decisions have given prominence. The first is the general rule to which we have just referred and which appears to be supported by a *dictum* of Hagarty, C.J., expressed in the following words: "that in all these questions of *ultra vires* it is the wisest course not to widen the discussion by

considerations not necessarily involved in the decision of the point in controversy." It is as difficult to accept such generalities as it is to contradict them. In order to deal with them it is necessary first to determine their precise meaning. It may safely be assumed that what is meant is, that in interpreting a Statute of the nature of the B. N. A. Act, the courts should specially refrain from generalizing its terms. We contend, with all due deference, that this is a fundamental error; the true principle being that the whole scope of the Act has to be constantly kept in view so as to co-ordinate the powers of both governments. This results not only from the nature of the Act but also from its form. Plainly it is an outline, the details of which are to be filled in at the suggestion of practical necessities. That this should be the case is evident to those who remember the circumstances of confederation. The assent of the people of four provinces had to be obtained. Manifestly it would have been impossible to get them to understand, and not less difficult to get them to adopt, a multitude of details. It was comparatively easy to indicate in general terms the powers of each government, and this is what was done. No one ever seriously contended that even the catalogues of Sections 91 and 92 were perfectly conclusive. Therefore there must exist a doctrine resulting from but undeveloped in the words of the Act. In practice, it may be added, the Privy Council has frequently laid down principles of the most abstract kind. It is difficult to conceive how, with any hope of avoiding even by hair-breadth escapes, contradictions, in the last degree unsatisfactory and disquieting to litigants, the courts are to proceed without adopting broad principles.

We next come to what we contend is a serious error of detail. In the case of *Hodge & The Queen*, their Lordships say: "It was contended that the Provincial Legislature had no power to impose imprisonment or hard labour for breach of newly created rules or by-laws, and could confer no authority to do so. The argument was principally directed against hard labour."

It is admitted that the question was not properly raised. Nevertheless, they decided it formally. They say, "under these very

general terms, 'the imposition of punishment by imprisonment for enforcing any law,' it seems to their lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—'hard labour'; in other words, that 'imprisonment' there means restraint by confinement in a prison, with or without its usual accompaniment, 'hard labour.'"

It will scarcely be questioned by any jurist that the power conferred by the Imperial Act, on a local legislature, to enact laws, decreeing a particular kind of punishment, cannot be extended more than an Act directly decreeing a similar punishment. It is elementary to say that the power to punish is always interpreted in the strictest manner. Their Lordships try to escape from this rule by saying that "the imposition of punishment by imprisonment for enforcing any law" are "very general terms," and that "hard labour" is generally incident to it; i.e., to imprisonment. It is not unimportant to observe that the terms of the Act are—"by fine, penalty, or imprisonment." There is a double answer to this—first, these terms are not "very general." They are very particular terms; and they have a technical meaning. They constitute the common law punishment for every misdemeanour, to which no other punishment is attached. To say that "hard labour" is an incident of imprisonment, is a novelty in English law. The learned judges might as well include solitary confinement and whipping as incidents of imprisonment, because they sometimes go together.

The following authorities put this beyond all question:

The ordinary punishment, at common law, for misdemeanour, is fine or imprisonment, or both, and in some aggravated cases, by infamous corporal pain. *The Earl of Northampton's case*, 12 Co. 134; 2 East, 838; 1 Deacon, vo. Hard Labour; 2 Deacon, vo. Punishment. To this may be added Mr. Justice Stephen's Art. 22, in "A Digest of the Criminal Law," which, although not conclusive as to what he believes the law actually is, nevertheless seems to lay down a principle which can hardly be questioned. Russell treats hard labour, as a separate form of punishment similar to solitary con-

finement or whipping; 1 Russell, 78, 5th Ed. Hard labour is not incident to imprisonment, and it can only be inflicted when specially authorized by the special act. *Greenwood & Martin's Magistrate and Police Guide*, p. 52, note Y.

The only ground that remains, is the use of the word "penalty." It may be said that every punishment is a penalty. If that be the interpretation, it is idle to talk of an incident to imprisonment, and the local legislatures can add "death" as the punishment for the breach of their laws. The absurdity of such a pretention would be the best answer if it were put forward, which, probably, it will never be. To adopt such a rule would be to defeat the provision that the criminal law was reserved to the Dominion Parliament. The meaning of penalty in Section 92, S. Sect. 15, is probably that pointed out by Mr. Justice Stephen in his "Criminal Law of England," p. 5.

We think, therefore, that we have shown not only that the power to decree "hard labor" has not been given to the local legislatures, but that it has been purposely withheld, in order that no infamous punishment should be awarded, by a local legislature, for the infraction of a local act. R.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, January 30, 1884.

Before TORRANCE, J.

THE BELMONT MANUFACTURING CO. v. ARLESS.
Contract—Subscription for shares—Company to be incorporated.

The defendant subscribed for one share in the capital of a company about to be incorporated. The name of the proposed company was changed in the Act of incorporation from the "Laurior" Manufacturing Company to the "Belmont" Manufacturing Company, and the list of shareholders filed in the office of the Provincial Secretary did not contain the name of the defendant. Held, that the change of name, and the omission to insert the defendant's name in the list of shareholders were immaterial, and that the subscription was binding.

The demand was for \$100, subscription by defendant for one share in the capital of the Lawlor Manufacturing Company. The subscription was denied. The evidence of John B. Lawlor was that the defendant signed in his presence one share in the stock of the company. The heading of the subscription book signed by defendant read as follows: "Subscriptions for the capital stock of the Lawlor Manufacturing Company; capital, one hundred thousand dollars (\$100,000), Montreal, Canada. The undersigned hereby agree to take, and they hereby do take and subscribe to the number of shares in said Company set opposite to their respective signatures, or any portion thereof, as may be allotted by the Board of Directors, the whole subject to the conditions contained in the Act incorporating said Company." This heading had reference to the company plaintiff under another name. The defendant subscribed about the 7th November, 1879. Notice of an application to the Lieutenant-Governor for Letters Patent under the Act was dated 31st December, 1879. The list of shareholders filed in the office of the Provincial Secretary did not contain the name of defendant.

PER CURIAM. The omission to insert his name does not appear to me of any consequence. He had rights as a shareholder which could not be affected by such omission. His argument against his liability would seem to be based upon the pretension that he had the right to refuse the share in the company after its incorporation. I have examined carefully the case of *The Union Navigation Co. v. Couillard*, 7 Rev. Légale, 215. The constitution of the company there as incorporated was changed from what was subscribed for by Couillard, and he was held not to be bound. As was remarked by one of the judges in the case of *Couillard*, the question is purely one of contract. I find here that the defendant bound himself for one share in the company, and he should be held to his bargain.

Judgment for plaintiff.

Macmaster, Hutchinson & Weir, for plaintiff.
S. Lebourveau, for defendant.

COUR SUPERIEURE.

MONTRÉAL, 24 Novembre 1883.

Coram TASCHEREAU, J.

DAME AMELIA J. ARMSTRONG et vir v. LA SOCIÉTÉ DE CONSTRUCTION MÉTROPOLITAINE et al.

Nullité de vente pour le paiement de taxes municipales.

JUGÉ:—*Que la vente d'immeubles faite sous l'autorité du code municipal pour le paiement des taxes sera déclarée nulle, 1. Si au moment de la vente le propriétaire était en faillite et ses biens remis entre les mains d'un syndic; 2. Si au moment de la vente un copropriétaire avait pris des procédés en licitation pour arriver à la vente et au partage des dits immeubles.*

PER CURIAM:—"Considérant que les ventes et adjudications faites le 6 et 7 mars 1882 sur le nommé Benoit Bastien, par la défenderesse, la Corporation du Comté d'Hochelaga, à la défenderesse la Société de Construction Métropolitaine et aux défendeurs F. X. Moisan, T. J. J. Loranger et Pierre Robert respectivement, des immeubles plus bas énumérés et décrits, sont nulles, illégales et de nul effet pour, entr'autres raisons invoquées par la demande, les suivantes, savoir:

1o. Parce que les dites ventes et adjudications ont été faites sur le dit Benoit Bastien, lequel était indiqué comme le seul propriétaire apparent des dits immeubles dans le rôle d'évaluation de la municipalité locale au profit de laquelle ces ventes et adjudications ont eu lieu; que les biens du dit Benoit Bastien, y compris les dits immeubles, étaient alors en la possession et sous la garde et le contrôle du défendeur Louis Dupuy, syndic à la faillite du dit Benoit Bastien, et que la dite Corporation du Comté d'Hochelaga ne pouvait pas valablement annoncer en vente et vendre, sous la prétendue autorité du Code Municipal, sur le dit Benoit Bastien des immeubles appartenant à sa faillite et dont le dit failli n'avait plus la possession ni la libre disposition depuis le commencement de sa faillite, savoir depuis le 28 février 1878;

2o. Parce qu'en outre les dits immeubles étaient, lors des dites ventes et adjudications, sujets à la licitation ordonnée par un jugement de cette Cour dans la cause portant le

No. 608, dans laquelle la présente demanderesse avait porté action contre le dit Benoit Bastien et autres co-propriétaires, et dans laquelle le dit Louis Dupuy était reprenant l'instance comme syndic à la faillite du dit Benoit Bastien, et parce que les dits immeubles ne pouvaient être enlevés au contrôle de l'autorité judiciaire pour être vendus pendant l'instance, sur un des co-propriétaires, savoir, sur le dit Benoit Bastien, par une corporation municipale, agissant ou prétendant agir en vertu des dispositions du Code Municipal ;

" Considérant que ces ventes et adjudications sont ainsi frappées de nullité radicale et absolue, et que la demanderesse, comme propriétaire d'une partie indivise des dits immeubles, avait et a intérêt de faire prononcer cette nullité ;

" Considérant que la défenderesse, La Société de Construction Métropolitaine et les défendeurs Moisan et Loranger ont déclaré s'en rapporter à justice, que les défendeurs Louis Dupuy, es-qualité, et Pierre Robert n'ont pas comparu, et que la demanderesse a déclaré se désister de sa poursuite quant au défendeur Joseph U. Emard ;

" Considérant que la défenderesse La Corporation du Comté d'Hochelaga, bien que suffisamment informée par l'action des moyens de nullité invoqués par la demanderesse, a jugé à propos de contester la demande, et s'est ainsi rendue passible des dépens encourus :

" Rejette les défenses de la dite corporation du comté d'Hochelaga ; déclare irrégulières, illégales, nulles et de nul effet, les ventes et adjudications faites le 6 et le 7 mars 1882 par la dite corporation du comté d'Hochelaga, à la défenderesse La Société de Construction Métropolitaine, et aux défendeurs Moisan, Loranger et Robert respectivement des immeubles suivants : (suit la description des immeubles) ; remet les parties en l'état qu'elles étaient avant les dites ventes et adjudications, pour la demanderesse, le dit Louis Dupuy, es-qualité, et le dit Benoit Bastien, exercer ultérieurement tel recours que de droit et contre qui de droit relativement à la propriété, à la possession et aux fruits et revenus des dits immeubles ; rejette le surplus des conclusions de la demande, et condamne la dite corporation du Comté d'Hochelaga à tous les dépens, y compris les frais de pièces.

Larreau & Lebeuf, pour la demanderesse.

C. A. Vilbon, pour la défenderesse.

SUPERIOR COURT.

SHERBROOKE, January 14, 1884.

Before BROOKS, J.

WILDER v. SUNDBERG.

Servitude—Enclavé—Right of passage—Public Road—Prescription.

1. *The right of passage in favor of an enclavé is based upon necessity not convenience, and ceases de plano with the necessity where no indemnity has been paid.*
2. *If under our law the right of passage for an enclavé may be perfected by prescription, the property must be enclosed during the whole time necessary to acquire prescription, and if it ceases to be so enclosed, prescription ceases to run.*
3. *The passage in dispute having been habitually kept closed at its ends by gates and bars, and not divided off from the remaining land, nor fenced on either side, and travelled only by the mere tolerance of the owner, has not become a public municipal road under the provisions of 18 Vict. cap. 100, sect. 41, sub-sect. 9.*
4. *The passage in dispute has not become a public municipal road by means of the informal procès-verbal produced, which is of another road not opened and not in force.*

BROOKS, J. This is an action *négatoire* to close a road or passage leading to the highway from defendant's land across that of the plaintiff. The plaintiff has been for two years the owner of the north half of lot No. 5, R. 3, Eaton, and the defendant owns the south half of lot 6 in same range, his property being adjoining that of the plaintiff. The plaintiff alleges that defendant claims a right of servitude or passage across his said land ; that no necessity exists for such passage ; that defendant's land is not *enclavé*, there being two public roads adjoining it, one leading to Sawyerville, the other to Eaton Corner ; and he asks that his land be declared free from such servitude.

The defence to this action rests upon three grounds :—

1st. That defendant's land is and always has been *enclavé* and that plaintiff's land has been subject to servitude in favor of defendants for over 40 years, and the enjoyment of

said passage for over 30 years has perfected the right of defendant to passage.

2. That for more than 10 years, to wit, for more than 30 years, this passage has been open to and used by the public, and has become a public municipal road under the provisions of the 18th Vict., cap. 100, sect. 41, S. S. 9.

3. That this road was by *procès-verbal* made a highway in 1856.

As to the first point, defendant's land is not *enclavé* now and has not been for years, just how long does not appear exactly. It has a highway to the west and south. There is variance in the time witnesses say that west road has been opened and travelled; but the witnesses whom I think best able to judge, state that the west road has been travelled at least 40 years, and a road called north road about 20 to 23 years, so that at any rate since 1853, defendant has not been *enclavé*, as witnesses say that he has good and easy means of access over his own lands to this west road, and now has equally good road to Sawyerville, by the south road. But defendant says that if the necessity has ceased, it existed for 30 years, and prescriptive right has been thereby acquired.

It would appear that 25 or 26 years ago, one Highgate Jordan was on defendant's land, but it does not appear when he went on or when the south half lot 6 R. 3 was first occupied. One witness, Henry Flanders, says he travelled the disputed road in 1838 and saw it travelled in 1832, but I think 1838 is about the time that it was first proved to have been travelled. Robert Wilder, who lives on an adjoining lot, states that this disputed passage has not been travelled over 45 years. Mr. Wm. Sawyer says that he travelled it 45 or 46 years ago, which would be 1839, and from the evidence generally I think it safe to say that it was first travelled in 1838. Flanders on cross-examination shows that he was not in a position in 1832 to know that it was being travelled as a road. It is proved by every one that it was always, except in winter months, closed at its extremities with gates and bars. Nothing was ever paid for right of passage, and no pretension of the kind is raised in defence. Now,

if the defendant ceased to have his land *enclavé* in 1853, which is the nearest date I can fix, he had not acquired any prescriptive right of passage. There is no proof whatever that this road was anything but a *chemin de tolérance*. Our own Code, Art. 540, says that right of passage by *enclavé* can be claimed *en payant*. There is no proof of any payment having been made by or to anybody. This was a passage which existed, *closed however at both ends*. But has the defendant shown sufficient to do away with the old maxim "*nulle servitude sans titre*"? It is said he has legal title by use 30 years while *enclavé*. That is not proved, while the contrary appears, and consequently, the necessity having ceased, and the defendant having failed to obtain any judicial recognition of his right, no prescriptive rights have been acquired. C. C. Art. 540-544, De Lorimier Vol. 4, p. 671, La Cour d'appel à Lyon; do. p. 694; Toullier, Vol. 3, sects. 554, 5, 6, 7; Marcadé, Vol. 2, pp. 629-31; Rogron, Vol. 1, p. 562; Sirey, p. 291-2-3, sect. 31; Aubry & Rau, Vol. 3, p. 31.

Marcadé, Vol. 2, p. 631, says: "La servitude dont il s'agit ici établit que vu le défaut de communication avec la voie publique, il s'ensuit que si cette communication venait à exister ensuite, soit parce qu'on établirait une route contre le terrain primitivement *enclavé*, soit parce que le propriétaire de ce terrain aurait acquis l'un des fonds qui le séparaient d'un chemin auquel il touche maintenant, la servitude s'évanouirait; sauf le droit pour celui qui aurait payé une indemnité d'en réclamer une partie, laquelle serait plus ou moins forte en raison du temps pendant lequel la servitude aurait existé."

Toullier, Vol. 3, Sect. 554, says: "La Cour d'Appel de Lyon proposait d'ajouter que, si le passage accordé au fonds *enclavé* cesse d'être nécessaire par sa réunion à un fonds aboutissant à un chemin, il sera supprimé, et que, s'il a été payé une indemnité, le prix sera rendu. Cette observation, conforme à l'équité, devrait être étendue au cas où il a été ouvert un chemin nouveau auprès du fonds autrefois *enclavé*. La cause cessant, l'effet doit cesser. Le propriétaire ne pourrait invoquer la prescription, car ce n'est point une servitude de

"commodité dont il a usé, mais une servitude de nécessité."

Sect. 556. "Le droit de passage accordé aux fonds enclavés qui n'ont pas d'issue sur la voie publique est fondé sur la nécessité."

Sect. 547. "Le Code ne donne le droit d'exiger un passage qu'à celui qui n'a aucune issue sur la voie publique. L'incommodité du passage ordinaire fût-elle extrême, ne suffirait pas pour forcer le voisin d'en céder un autre."

Aubry & Rau, Vol. 3, p. 31. La loi n'accorde au propriétaire d'un fonds enclavé le droit de passer sur les fonds voisins, qu'à raison de la nécessité résultant de l'enclave, ce droit ne peut plus être réclaté, lorsque l'enclave vient à cesser, soit par l'établissement d'un chemin, soit par la réunion du fonds originairement enclavé à un héritage communiquant à la voie publique. Il en est ainsi lors même que le passage a été exercé pendant plus de trente ans ou qu'il l'a été après paiement d'une indemnité sauf dans ce dernier cas, la restitution de l'indemnité dont le paiement se trouverait justifié."

Sirey et Gilbert, Vol. I, p. 293, Sect. 30-31 : "Et même la servitude s'éteint dès l'instant qu'au moyen d'acquisitions faites par le propriétaire enclavé, l'état d'enclave a cessé, encore même que le nouveau chemin à parcourir soit plus long que l'ancien."

Sect. 33. "La restitution de l'indemnité ne doit être ordonnée qu'autant qu'il y a preuve positive qu'elle a été payée."

Now, if defendant's property was *enclavé* in 1838, it did not continue so for 30 years, because long before the expiry of 30 years, it ceased to be *enclavé*. The west road, so called, led to his property and was publicly travelled 40 years ago. By this road he and his *auteurs* had direct communication with Eaton Corner. And by the north road which was opened and travelled between 20 and 25 years ago, he had communication with the stage road, so called, direct to Sawyerville, and now a new road, called south road leading to Sawyerville, has been opened on the other side of defendant's property.

The passage in dispute, therefore, is used from convenience rather than necessity.

Has this become a public municipal road by means of 10 years' use under 18th Vict. cap. 100, sect. 41 s. 9,—which declares "that any road left open to and used as such by the public during a period of 10 years and upwards, shall be held to have been legally declared a public highway, and to be a road within the meaning of this Act?"

This road has never been left open to the public. It has always, except during the winter months while snow was on the ground, been closed with gates and bars, and it would seem purposely so. Jerome Sawyer, who lived on defendant's land, says that Hazleton who then owned plaintiff's land, always claimed that this was not a road, and persisted in keeping up gates and bars, that is, keeping it closed so that no right to a road should be acquired by prescription. Our Municipal Code, Sect. 749, declares what since its passage has been the law, and I think it may be reasonably interpreted as having been the law before: "Land or passages used as roads by the mere permission of the owner or occupant, are municipal roads if they are fenced on either side or otherwise divided off from the remaining land, and are not habitually kept closed at their extremities."

Now this road has been habitually kept closed, and as it appears purposely so. It has never been divided off from the remaining land, nor fenced on either side. Most of the way it is a mere track through the field without ditches. There is absolutely nothing proved showing or tending to show any intention on the part of the plaintiff or his *auteurs* to dedicate or abandon this road to the public use. The public, by the mere tolerance of the plaintiff and his *auteurs*, were permitted to use this road in order to reach the defendant's land, but to do so they were obliged to open and close the gates and bars, and until about 10 years ago, this road was used for no other purpose than to go to the defendant's. Vide Q. L. Reports, Vol. 9, pp. 98, 9, *Roy v. Beaulieu*. It is against public policy that such passages should become public roads at the charge and maintenance of the municipality.

Has this road become a highway by reason of the *procès verbal* produced?

The *procès verbal* is wholly informal, but what does it show? That another road or passage than the one in dispute *now* was laid out by the municipality, but was never opened. James Addie says that road does not touch the disputed road. No road work was ever done, no tax expended. It has not been kept fenced, nor separated from adjoining property. Highgate Jordan did not do what he was called upon to do by the *procès verbal*, nor did the owner of south half of lot 5 in R. 3. No expropriation was ever made.

This is not a highway; the defendant has not acquired the right to travel now that necessity has ceased, and consequently plaintiff's action is maintained with costs.

Camirand, Hurd & Fraser, for plaintiff.

Ires, Brown & French, for defendant.

COUR SUPERIEURE.

MONTRÉAL, 1er mai 1883.

Coram MATHIEU, J.

DAME M. MARCILE V. DAME R. MATHIEU.

Responsabilité du propriétaire—Mis en demeure—Force majeure.

1. JUGÉ:—*Que le bailleur n'est tenu des dommages résultant de son défaut d'entretenir les lieux en bon état de réparations, que lorsqu'il a été dûment mis en demeure, ce qui ne peut être fait que par écrit lorsque le bail est authentique.*
2. *Qu'il n'est pas non plus responsable des dommages qui ne résultent pas de sa négligence, mais sont la conséquence d'un incendie, surtout lorsqu'il a fait diligence pour réparer les lieux.*

Les faits de la cause apparaissent suffisamment dans le jugement qui suit :

" La Cour, etc....

" Attendu que la dite demanderesse allègue dans sa déclaration que par bail passé, à Montréal, le 25 avril 1882, devant M^{re}. V. Lamarche, Notaire, la défenderesse loua à la demanderesse pour l'espace d'une année à compter du premier mai alors prochain, en considération de la somme de \$168.00 payable par paiements égaux et mensuels de \$14.00 chaque, le haut d'une maison décrit comme suit au dit bail : " Le logement de haut au-

dessus du No. 36 de la rue Notre Dame de cette ville ;" que la demanderesse prit possession de ce logement le premier de mai 1882 et qu'elle l'a occupé et l'occupe encore ; que la demanderesse est veuve et qu'elle avait loué ce logement dans le but de tenir une maison de pension, et de sous-louer des chambres ; que la défenderesse était tenue par le bail et par la loi de lui procurer une possession et jouissance paisible de ce logement ; que depuis trois mois, par la faute et la négligence et le refus de la défenderesse de chauffer ou de faire chauffer le bas ou les étages inférieurs de la maison, l'eau est complètement gelée dans les conduits et ne peut plus monter jusqu'au logement de la demanderesse ; que cette dernière et sa famille sont obligés d'aller chez les voisins pour aller chercher de l'eau pour les choses les plus nécessaires, et que le cabinet d'aisance ne pouvant plus fonctionner, il en est résulté un amoncellement d'immondices, qui émet une odeur infecte et rend le logement dangereux à habiter et inhabitable ; que la demanderesse a tout fait pour ne pas être obligée de recourir à la justice, qu'elle s'est plaint plusieurs fois et vainement aux officiers du bureau de santé et à la police, et qu'elle a sommé la défenderesse et ses agents de remédier à cet état de choses intolérable ; que depuis trois mois elle a souffert par suite du manque d'eau, des dommages considérables tant sous le rapport de sa santé et celle de sa famille, que sous le rapport pécuniaire ; que plusieurs de ses pensionnaires et des personnes qui avaient loué d'elle des chambres sont partis, et que d'autres ont refusé de s'y loger, après avoir constaté l'état dans lequel se trouvait le dit logement ; que le refus et la négligence de la défenderesse de chauffer le bas de la dite maison ont rendu plus difficile le chauffage du logement de la demanderesse ; que cette dernière et quelques-uns des membres de sa famille sont malades et que ces maladies proviennent du mauvais état de ce logement par le manque d'eau ; que les dommages causés à la demanderesse à raison des faits plus haut relatés sont de deux cents piastres, qu'elle réclame ;

" Attendu que la dite défenderesse a plaidé à cette action qu'elle a livré et entretenu en bon état le logement et qu'elle en a procuré à la demanderesse une jouissance paisible jus-

qu'à ce jour ; que le bas de la maison en question a toujours été convenablement chauffé, et que s'il est arrivé que les tuyaux à l'eau aient gelé, cela est dû à l'extrême rigueur de la saison et est une force majeure, dont la défenderesse n'est pas responsable ; que dans tous les cas, la demanderesse ne s'est jamais plaint à la défenderesse et ne lui a pas dénoncé les faits dont elle se plaint dans son action. Mais, qu'au contraire, la défenderesse n'a appris que les tuyaux étaient gelés que le 3 de mars 1883 par la police sanitaire qui en a averti un de ses fils, quoique la demanderesse eut eu plusieurs occasions d'avertir la défenderesse de ces faits : que dans l'après-midi du dit 3 mars dernier, la défenderesse a envoyé des ouvriers pour réparer les tuyaux qui ont été remis en ordre dans le plus court délai possible ; que par conséquent la défenderesse n'a aucun tort, ayant fait toute diligence pour réparer ce qu'avait causé une force majeure, et ce aussitôt qu'il lui a été possible de le faire ;

"Considérant que par le bail consenti par la défenderesse à la demanderesse le dit 25 avril 1882 devant le dit Lamarche, Notaire, et par les dispositions de l'article 1641 du Code Civil, la défenderesse était tenue de faire jouir paisiblement la demanderesse du logement en question ;

"Considérant que par les dispositions du dit article 1641 du Code Civil, le locataire a droit d'action pour le recouvrement de dommages-intérêts à raison d'infractions aux obligations résultant du bail ;

"Considérant cependant que le bailleur n'est tenu aux dommages-intérêts résultant de son défaut d'entretenir les lieux en bon état que lorsqu'il est mis en demeure, conformément aux dispositions de l'article 1070 du Code Civil, qui décrète que les dommages-intérêts ne sont dus pour l'inexécution d'une obligation que lorsque le débiteur est mis en demeure, conformément à quelques-unes des dispositions contenues dans les articles de la section 2 du chapitre 6e du titre 3e du livre 3e du dit Code Civil ;

"Considérant que par les dispositions de l'article 1067 du dit Code Civil contenues dans la dite section 2 du dit chapitre 6e, la défenderesse devait être mise en demeure par une

demande par écrit, vu que le bail est un bail notarié ;

"Considérant que le mauvais état des lieux n'a pas été causé par la faute de la défenderesse, mais est le résultat d'un incendie, et que la dite défenderesse n'a jamais été mise en demeure régulièrement, conformément aux dispositions de la loi, et que par cette raison, elle ne peut être tenue responsable des dommages-intérêts réclamés par la demanderesse, avant que la défenderesse ait été mise en demeure comme susdit ;

"Considérant de plus que la défenderesse paraît avoir fait réparer les tuyaux avec une diligence convenable ;

"Considérant que l'action de la demanderesse n'est pas pour contraindre la défenderesse à faire les réparations nécessaires, mais est une action en dommages ;

"Considérant que l'action de la dite demanderesse est mal fondée et que les défenses de la défenderesse sont bien fondées ;

"A maintenu et maintient les dites défenses et a renvoyé et renvoie l'action de la dite demanderesse, avec dépens distraits à Messieurs Barnard, Beauchamp et Doucet, Avocats de la défenderesse.

Longpré & David pour la demanderesse.

Barnard & Beauchamp pour la défenderesse.

(J.J.B.)

GENERAL NOTES.

M. Mousselet tells a story of the late Brillat-Savarin, who was well known to be fond of good eating, that his colleagues in the *Cour de Cassation* were considerably upset sometimes, by the smell of game which he carried in his pockets, that it might get "high !"

Among journals devoted to special vocations is one bearing the cheerful title of the *Shroud*, which has been recently amalgamated with the *American Undertaker and Burial Case Manufacturer*. In a frolicsome way it "wishes that all its readers may have one of those merry and jolly times which are associated with the coming New Year," and adds, "the *Shroud* wishes the manufacturers a phenomenally prosperous year, and the undertakers happiness and prosperity. May the coming year be all that the trade could desire."

Some time ago, Mr. Justice Lawson committed Mr. Dwyer Gray, of the Dublin *United Irishman*, to prison for contempt of Court. When Gray got out again, a few weeks later, he found Lawson's country villa at Bray to let for the summer. "Just what I want for the season," he exclaimed, and rented it forthwith. That evening Lawson's agent said to the Justice: "I rented your house to-day, and to whom do you suppose?" "I'm sure I don't know." "Dwyer Gray." "Well, that's better quarters than I gave him before."

The Legal News.

VOL. VII. FEBRUARY 23, 1884. No. 8.

RUSSELL & LEFRANÇOIS.

The judgment of the Supreme Court in this case was rendered on the 11th January, 1883, but as yet no report of it has seen the light. The proceedings on the appeal to the Supreme Court present some peculiarities which it is desirable to make known beyond the precincts of the modest retreat where the highest of our courts makes known the results of its vigils.

In its passage through the very inferior tribunals of this province, the case was one purely of evidence. The question to be decided was whether an eccentric old man, formerly a pilot, was insane when he made a will leaving almost the whole, or nearly the whole, of his property to a woman, who was married to him publicly and whom he believed to be his wife, and who for all that is known in this case was his wife. The person excluded by this will was a niece who had lived with the testator till after his marriage, and whose principal pretension in the suit was that her uncle had made a will in her favor not four weeks before the one she complained of, that he was perfectly sane when he made the former and insane when he made the latter will. Her second proposition was that she was an heir at law. By a judgment pronounced by Chief Justice Meredith and showing all his well known care and discernment, the will was maintained. The niece appealed, and the judgment was maintained by the Court of Queen's Bench, the Chief Justice alone dissenting. From this judgment the niece appealed again. The case was heard by the Supreme Court towards the end of 1882. The Court, composed of Chief Justice Ritchie, Strong, Fournier, Taschereau and Gwynne, J.J. (the two first dissenting), reversed the judgment of the two Provincial Courts, and rendered the following judgment:

"Considering that in the judgment rendered by the Superior Court for Lower Canada, sitting at Quebec, in the District of

Quebec, on the 2nd of May, 1880, there is error;

"And considering that in the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), rendered at Quebec on the 4th February, 1882, on the appeal of the said Elizabeth Russell from said judgment of the Superior Court, there is also error;

"This Court did order and adjudge that the demand in intervention of said Elizabeth Russell, and the *moyens* of intervention filed and of record in this cause, and the declaration of the said Elizabeth Russell against the said Julie Morin, be amended and be henceforth held and taken to be amended for all lawful intents and purposes whatsoever, by adding to each of them in the record the allegations following, that is to say:—

"That the said will of the 27th day of November, 1878, and the universal bequest therein made to Julie Morin, are also null "by reason of error, the said William Russell having made such will and the said universal bequest, because he believed that the said Julie Morin was his lawful wife, "when in truth the said Julie Morin was "not then his lawful wife," and by adding also to the conclusions of the said paper-writing in the record, a demand that the universal legacy made to the said Julie Morin by the said will be set aside and annulled.

"And this Court, proceeding to render the judgment which the said Superior Court, exercising original jurisdiction, *ought to have rendered*, and which the said Court of Queen's Bench for Lower Canada, upon the appeal of the said Elizabeth Russell, *ought also to have rendered*, did order and adjudge that the said appeal of the said Elizabeth Russell should be and the same was allowed, and that the judgments aforesaid should be and the same were reversed, and that the contestation by the said Julie Morin of the demand in intervention of the said Elizabeth Russell should be and the same was dismissed, and that the said intervention of the said Elizabeth Russell should be and the same was maintained, and that the conclusions thereof should be and the same were granted with costs of the said Superior Court against the said Julie Morin.

"And this Court did further order and adjudge that the action of the said Elizabeth Russell against the said Julie Morin should be and the same was maintained with costs against the said Julie Morin."

Without entering into the particular merits of this decision, the result of the litigation is unsatisfactory, and even disquieting. In the first place it was confidently stated in Quebec early in December, 1882, that is to say, more than a month previous to the rendering of the judgment, that the appeal would be successful. The knowledge of this secret may have been obtained surreptitiously, but it is unfortunate, to say the least of it, that an accident should have occurred which gives room to suspect an exchange of confidence between the partisans of the interesting and disinherited niece, and those who were to be her judges.

The next disturbing element of the judgment is, that it presents the spectacle of four judges overwhelming seven on a pure question of evidence, and particularly one where the burden of proof was on the appellant. Of course the theory of the law is that the last judgment is presumed to be right, and that the decision of the majority is to be considered as infallible as the unanimous finding of the whole Court. It is impossible there should be any other theory, but people cannot be set at ease by telling them that it is convenient they should be satisfied. It is impossible to prevent an illogical public from saying, "we know that convenience and not "superiority dictates the selection of judges "to some extent and decides almost entirely "in what court they shall sit." They will not believe that the echoes of the preponderating voice are a bit more authoritative at Ottawa than in some rural district, or that the scarlet and ermine adds a tittle to the discriminating powers of the judge. Again, there is a sixth judge, who might have sat and who ought to have sat; and it is quite possible that if he had been in his place the judgment would have been the other way. We have therefore the judgment of two courts reversed, three to two, with the opinion of one member of the Court suppressed.

No importance is to be attached to the argument that the case was one of evidence,

and that therefore it should not be touched. It is more than clear that if the evidence is submitted to a court of appeal the judges are bound to consider it, and it is only to waste time for the three judges to tell us indirectly that they are now aware they fell into an egregious error when they gave Mr. Gingras \$3,000 for the end of his finger. Everybody already knows they were wrong, notwithstanding the theory of authority. If, then, the majority was convinced that the courts below had misjudged the evidence, they were bound to reverse. When it is said courts do not readily reverse on questions of fact, reference is made to an operation of the mind and not to a function of the Court. Unfortunately the three judges of the Supreme Court thought themselves justified in ordering the appellant's intervention to be amended by adding the allegation that the bequest was null from error, that it was made to the testator's wife, Julie Morin, whereas she was not then his lawful wife. The power to rectify mere errors by amendment is very beneficial, and it should be extended as much as possible; but nobody ever heard of a whole cause of action being introduced in an appeal to bolster up the appellant's case, or indeed anywhere without giving the party an opportunity to meet the allegation. The Supreme Court could not know judicially that Julie Morin was not the wife of William Russell, and legally speaking there is no evidence of the fact.

In face of a proceeding so utterly at variance with all ideas of fair-dealing, and so contrary to the usages of courts, it is difficult to escape from the conclusion that the amendment indicates want of a very firm faith in the justness of their decision as to the case before them.

The power to amend which the Supreme Court, acting as a Court of Appeal, claims exceptionally to possess, is based on a Statute which, by the peculiarity of its phraseology, is remarkable, even amidst the curious remains of our legislative literature. It is in these words: "At any time during the *pending* of any appeal before the Supreme Court, the Court may, upon the application of any of the parties, or without any such application, make all such amendments as

may be necessary for the purpose of determining the existing appeals, or the real question or controversy between the parties as disclosed by the pleadings, evidence or proceedings." 43 Vic., c. 34, s. 1. We may perhaps make a shrewd guess at what is meant by "the pending" of an appeal, but it is impossible to understand, what need there is for an amendment of what is already disclosed by the pleadings, evidence or proceedings. The majority of the Supreme Court evidently thought it was a license to add a totally new cause of action. In their haste to come to the rescue of the appellant, the learned judges never stopped to enquire whether it was within the powers of Parliament to make a law allowing the Supreme Court to introduce a totally new cause of action into the proceedings. The power is to create a Court of Appeal; it is not a function of an appeal court to supply issues that are not pleaded. The so-called amendment is a misnomer, it amended nothing, it created a pretension which was not even hinted at in the pleadings. Further, this violent proceeding is attempted to be justified by a "motive" which is not in accordance with fact. The amendment was not made because the Superior Court or the Court of Queen's Bench was in any error as to the question of law. It was made to give a broader basis to the judgment of the Supreme Court.

R.

NOTES OF CASES.

COUR SUPERIEURE.

MONTREAL, 30 novembre 1883.

Coram PAPINEAU, J.

MÉNARD v. LUSSIER & al.

Paiement—Mise en demeure—Offres réelles—Absent.

Jugé:—Que lorsque le paiement doit se faire en la demeure du créancier et que le créancier décide avant de recevoir son paiement, le débiteur ne peut déposer le montant dû entre les mains du protonotaire et poursuivre les créanciers pour sa décharge, mais qu'il doit mettre légalement les héritiers du créancier en demeure de se rendre au lieu convenu pour y recevoir leur paiement.

Que s'il y a des absents parmi les héritiers, le débiteur doit se prévaloir de l'acte des dépôts Judiciaires, Québec, 1871, 35 Vict.

Le demandeur aurait emprunté, en 1878, de feu Demoiselle Cordélia Lussier, une somme de \$500, payable dans un an en la demeure de la créancière, à Varennes.

La créancière mourut l'année suivante laissant les défendeurs pour héritiers. Le demandeur, en 1881, voulant s'acquitter, se rendit au lieu convenu, ayant alors constaté le décès de sa créancière, il déposa d'abord le montant dans une banque, puis en cour et intenta une action contre les héritiers pour obtenir une décharge.

Les défendeurs plaidèrent que le paiement devait se faire en la demeure de feu Cordélia Lussier, et qu'ils n'avaient jamais été mis en demeure de se rendre à cet endroit pour recevoir leur paiement, et que le demandeur n'avait pas fait d'offres réelles, ni au lieu convenu, ni aux défendeurs personnellement.

La cour rendit le jugement suivant :

" La cour, après avoir entendu les parties, tant sur la motion des défendeurs pour faire rejeter du dossier la preuve faite par le témoin Brais du paiement et des offres ou tentatives d'offres au domicile de Demoiselle Cordélia Lussier, que sur le mérite, etc. ;

" Attendu que cette preuve de paiement et offres par le dit Brais se trouve comprise dans une déposition contenant d'autres faits qu'il était permis au demandeur de prouver par témoin, la dite motion n'est pas accordée, mais le témoignage restera au dossier pour valoir ce que de droit seulement, et les frais d'icelle motion suivront le sort de la cause.

" Et adjugeant sur le mérite :

" Considérant que le demandeur a consenti l'obligation du 13 février 1878 en faveur de Demoiselle Cordélia Lussier pour la somme de \$500 avec intérêt du taux de sept pour cent l'an, qu'il s'est obligé par son acte passé devant M^{re} A. H. Bernard, notaire, de rembourser au bout d'un an, en la demeure de la dite créancière, qui demeurait alors au village de Varennes, et que les parties au dit acte ont fait élection de domicile en leurs demeures actuelles pour l'exécution du dit acte ;

" Considérant que le demandeur n'a pas payé le capital de la dite obligation au temps

et au lieu convenus dans le dit acte, et qu'il n'a payé qu'une année d'intérêt, savoir, celle finissant au 13 février 1879 ;

" Considérant que la dite créancière est décédée dans le courant de mai 1879, et que les défendeurs sont ses représentants ; mais que le fait de son décès n'a pas pu avoir l'effet de changer la convention des parties que le paiement serait effectué au lieu déterminé par cette convention qui fait la loi des parties ;

" Considérant qu'il est prouvé que Félix Lussier, l'un des défendeurs et héritiers de la dite créancière Cordélia Lussier demeurait encore, au temps de l'institution de la poursuite au lieu où le paiement devait se faire ;

" Considérant que le demandeur n'a pas prouvé avoir fait des offres réelles au lieu convenu pour le paiement, et qu'il n'a pas assigné les défendeurs à venir y recevoir le paiement de leur créance, mais qu'il les a assignés à venir le recevoir ailleurs qu'au lieu convenu, c'est-à-dire au Greffe de cette Cour, où ils ne sont pas tenus de se rendre pour recevoir leur argent ;

" Considérant que pour ceux des défendeurs dont le domicile est en dehors de la Province, le demandeur ne s'est même pas prévalu de l'avantage, que la loi qui donnait de déposer et consigner entre les mains du Trésorier de la Province, et que son action est mal fondée, la cour l'en déboute avec dépens distraits à Maitres Barnard, Beauchamp & Barnard, avocats des défendeurs ; sauf au dit demandeur à se pourvoir." *

Pelletier & Jodoin, pour le demandeur.

Barnard, Beauchamp & Barnard, pour les défendeurs.

(J.J.B.)

SUPERIOR COURT.

MONTREAL, February 7, 1884.

Before TORRANCE, J.

GILMAN v. ROBERTSON et al.

Injunction to restrain from voting on shares—Discretion of Court.

In determining an application by a shareholder for an injunction, the Court will look to the circumstances of the case, and adopt the course which is most for the advantage of the whole body of shareholders. So, where

a shareholder asked for an interim order to restrain persons from voting on certain shares, and it appeared that the shares had been held by the defendants for more than a year, to the knowledge of the petitioner, an injunction was refused, more especially as the petitioner had a remedy by quo warranto if he were wronged by an illegal vote.

This was an application for an injunction. Plaintiff had instituted an action to have 338 shares of stock in the Royal Canadian Insurance Company, transferred by Kay to Robertson in trust on the 31st December, 1881, and by the latter to Arthur Gagnon on the 30th December, 1882, and by said Gagnon on said last mentioned date to said defendants and others, declared to have still due payable and unpaid arrears of calls thereon which were payable before any of said transfers were made, and to have defendants as transferees of said stock with knowledge of the facts, declared, *inter alia*, to be shareholders in arrears of calls on stock and not entitled to vote. A meeting of shareholders was called for 7th February, and it was asked from the Court that an order go enjoining defendants not to vote on the stock held by them, or at any rate on the 338 shares derived from Kay. The evidence of Mr. Gagnon shows that the transfer from Kay to Robertson was without money consideration. The consideration was that Robertson should hold until the shares should realize so much on account of interest. Robertson took them in trust. They were afterwards transferred by him to Gagnon for \$15 per share, and by him transferred to the defendants on 31st December, 1882. These were all directors before the transfer from Kay and cognizant of the transfer from him, except Benjamin Ross and Sise. Plaintiff also knew of the nature of the transfer from Kay to Robertson at or about the time it was made, and approved of it. He also knew of the subsequent transfers.

PER CURIAM. The last transfers were made on the 31st December, 1882, more than a year ago. That is to say, that plaintiff has been quiescent upwards of a year and now beginning his action, which may or may not be well founded, for we have still to discuss the merits, he asks for an interim injunction de-

* Confirmed in Review, 31 Jan., 1883.

priving the defendants of their rights of possession of this stock which they have held with his knowledge during this period and doubtless voted upon. I do not prejudice plaintiff's rights, I am not in a position to decide them on the single deposition of Mr. Gagnon, but it is my duty to use a wise discretion as to whether this interim order should be made, which deprives parties of a possession and enjoyment which they have had undisturbed with the knowledge of plaintiff so far as the evidence goes. See Kerr, Injunctions, p. 16; pp. 482, 483, [551, 552]. I would further remark on the complaint of Mr. Trenholme that the company did an illegal act in taking the mortgage from Kay, that the transaction was not the lending of money which the charter forbade where the borrower was a director or shareholder. It was rather the taking of security from a debtor who was unable to pay, and the transfer of stock from Kay was probably commendable for the same reason. I would here emphasize a remark of Mr. Kerr just now read, that in determining the question, the Court looks to the peculiar circumstances of each case, and will, as a general rule, adopt that course which is most for the advantage of the whole body of the shareholders. A high French authority referring to these interim proceedings (1st vol. Bonjean, 2), says that the administration of justice in France is more repressive than preventive. What do the equities here demand? If something is done at the meeting to-day by which a director is elected by a vote which should not have been cast for him, it will be easy and very summary for a *quo warranto* to give redress. I do not think the case now before the court, demands its interference by injunction.

Of course, I say nothing as to the rights of the petitioners in the action itself. I see here the possession of the defendants at any rate since the 31st December, 1882, to the knowledge of petitioner. Let the position of the parties remain as it is until adjudication unless some other cause of disturbance arise.

Injunction refused, costs reserved.

N. W. Trenholme and A. W. Atwater, for petitioner.

J. J. Maclaren, L. N. Benjamin and C. A. Geoffrion, for defendants.

SUPERIOR COURT.

Before TORRANCE, J.

MONTREAL, February 11, 1884.

BAXTER V. THE UNION BANK OF LOWER CANADA.

Service of Summons—Joint Stock Company.

Service of summons on a Bank or other joint stock company should be made at its chief place of business.

PER CURIAM. The question here was the merits of an exception *à la forme*.

The defendant had been served at its branch office in Montreal upon its agent, to answer a claim arising out of a transaction there. It objected that it should have been served at Quebec, even to answer in Montreal.

By its charter, 29 Vic., c. 75, s. 17: "The chief place or seat of business of the Bank shall be in the city of Quebec, but the directors may open and establish in other cities, towns and places in this Province, branches or offices of discount and deposit of the said Bank," &c. By C. C. P. 61, "Service upon a joint stock company may be made at its office, speaking to a person employed in such office, or elsewhere upon its president, secretary or agent." By C. C. P. 63, "Service upon a body corporate is made in the manner provided by its charter, and in the absence of such provision, in the manner prescribed in the two preceding articles." The codifiers on C. C. P. 61, refer to 23 V. c. 31, an act respecting the Judicial Incorporation of joint stock companies for certain purposes. S. 55 of this act says, "Service of all manner of summons or writ whatsoever upon the company may be made by leaving a copy thereof at the office or chief place of business of the company, with any grown person in charge thereof, or elsewhere with the president or secretary thereof, or if the company have no office or chief place of business," &c.

It is plain that the operations of the Bank outside of Quebec are limited to discounts and deposits, and it seems reasonable that a matter of such importance as a suit should at once be brought under the notice of the chief authorities who are at Quebec. That can best be done by serving them at Quebec.

C. C. P. 61 speaks of service at its office. Surely that means the chief office, looking at the reason of the rule or the words of the statute referred to, namely 23 Vict., c. 31. It is not accurate to conclude that the office intended by C. C. P. 61 is an office wherever they have a branch or agent. Again, let us look at the case from another point of view. If the service at Montreal is good as regards the writ of summons, the service there of a rule to answer interrogatories on *faits et articles* should be good. The defendant should answer with one day's notice, but the Montreal agent has no power to make such answer. The directors in Quebec must authorize the answer, C. C. P. 224, and in order to have time to answer, the rule should be served at Quebec. If service of the rule at Quebec is necessary, surely the service of the summons at Quebec is necessary too. *Toupin v. La Compagnie des mines de St. François*, 5 Rev. Lég. 209, appears to be in point.

Exception maintained.

Greenshields, McCorkill & Guerin for plaintiff.
Lunn & Cramp, for defendant.

SUPERIOR COURT.

MONTREAL, February 13, 1884.

Before TORRANCE, J.

TAYLOR et al. v. BROWN, and AUDENRIED et al.,
T.S., and THE FEDERAL BANK OF CANADA,
opposants.

Garnishment—Insolvency of defendant.

Judgment on the declaration of a garnishee operates a judicial assignment to the plaintiffs, and an opposition subsequently filed by another creditor, alleging insolvency of the defendant (as of date of opposition), and asking that the moneys be paid into Court is insufficient, and will be rejected on motion.

This was a motion by plaintiffs to reject the opposition of opposants.

The opposants by their opposition set forth that on the 31st October, 1883, the defendant was condemned to pay to opposants the sum of \$1,510.72 and costs; that on the 28th December, 1883, judgment was rendered in the present cause declaring an attachment made by plaintiffs in the hands of the gar-

nishees, Gershom Joseph, Horace Joseph, the Singer Manufacturing Company, and John Creilly, good and valid, and ordering them to pay over to plaintiffs the sums of money by them declared to be due by them to the garnishees, Audenried, Brown & Co., who were the same as the defendant: That on the 4th January, 1884, judgment was rendered, declaring the attachment made by plaintiffs in the hands of J. D. Nutter & Co., good and valid, and ordering said Nutter & Co. to pay the money in their hands due defendant to plaintiffs; that defendant was now insolvent and unable to pay his debts; that by reason of said insolvency, opposants were entitled to share in said moneys which should be paid into court and distributed according to law. Prayer accordingly.

PER CURIAM. It is to be observed here that the allegation by opposants of insolvency does not go further back than the date of the opposition, namely, the 10th January, 1884, and the judgments against the garnishees are of date the 28th December, 1883, and the 4th January, 1884, being anterior dates. The seizure by plaintiffs and transfers by the judgments against the garnishees should therefore operate and be efficacious in favour of plaintiffs. The plaintiff is preferred, C. C. P. 602, saving the case of insolvency and privileged claims, and insolvency does not appear before the 10th January. Further, by C. C. P. 625, the judgment on the declaration of the garnishees is equivalent to a judicial assignment to the plaintiffs. On the face of the opposition, therefore, the rights of the plaintiffs should prevail and the motion be granted.

Opposition rejected.

Macmaster, Hutchinson & Weir, for opposants.

Hatton & Nicolls, for plaintiffs.

SUPERIOR COURT.

MONTREAL, February 13, 1884.

Before TORRANCE, J.

STEPHEN et al. v. THE MONTREAL, PORTLAND & BOSTON RAILWAY Co., and BARLOW, interveners.

Procedure—Intervention in injunction suit—Delays.

Where the principal action is of a summary nature the proceedings on an intervention therein are governed by the same rules.

This was a motion by petitioners to reject the inscription for evidence and hearing by default as premature and irregular.

PER CURIAM. The proceedings by petitioner are of a summary nature under C. C. P. 1000 *et seq.* and 1003. The usual delays for appearance and pleading do not apply. The petitioners contend that on the intervention the usual delays do apply. Against this pretension it is said that the intervention being an incident in the summary proceedings for injunction must be governed by the same rules. The accessory must follow the principal. *Accessorium regulatur secundum principale. Accessorium sequitur principale.* It would be intolerable if the intervener introducing himself into the record could have the effect of entirely altering the procedure and so deprive the case of its summary character. The case of the *Merchants' Bank v. The Montreal, Portland & Boston Railway Co.*, and *Ingram, guardian, and Shepherd, intervener*, decided by this Court and confirmed in review, is an entirely different case. The intervener there introduced himself into the record to protect his rights against the plaintiff, and there the ordinary procedure was observed as between him and plaintiff.

The demand by plaintiffs in that case was instituted under the ordinary procedure, and properly the intervention followed the same rules. Here in the present case, the exceptional procedure governs the petitioners and all the parties, because it is an exceptional case. In the present case the intervener is in the exercise of his legal rights, and his inscription should stand.

Motion rejected.

J. L. Morris, for intervener.

James O'Halloran, Q.C., for petitioner.

CIRCUIT COURT.

RICHMOND, January 21, 1884.

Before BROOKS, J.

ROBERT ALLEN et al. v. THE CORPORATION OF RICHMOND.

County Council—Rescission of procès-verbal of road.

A county council cannot, by mere resolution without notice, amend or rescind a procès-verbal establishing a highway.

Petition to set aside resolution of council rescinding action taken previously, to wit, on 13th December, 1882, homologating procès-verbal of Ferry Road.

PER CURIAM. It would appear that a petition of certain ratepayers in Richmond County, asking that a road called the Ferry road should be homologated, was submitted to the County Council on 20th November 1882. That Wm. Brooke was appointed special superintendent to report upon the petition at next session of Council and lay out and open the road. That on the 13th December, 1882, said William Brooke did so report and produced a *procès-verbal* of said road, declaring it a county road. That it was then resolved by motion in said Council that said report and *procès-verbal* be homologated, and that the said road be declared a county road. Matters remained in this condition, except that public notice was given of said homologation, until the next general meeting of the County Council, held on 14th March, 1883 (there having been a special meeting held on the 19th February, 1883), when the minutes of the December meeting were read and confirmed, and subsequently a resolution was passed by which, after referring to the previous action of the Council with regard to the Ferry Road, it was resolved upon the casting vote of the Warden (who also voted) that the action then taken be rescinded.

Certain ratepayers being dissatisfied with this proceeding have, under the provisions of articles 698 and 100 of the Municipal Code, petitioned to have said resolution of 14th March last declared illegal and null and set aside, alleging the main facts briefly, to wit, the petition for the road, the appointment of special superintendent, his report and *procès-verbal*, its homologation and notice thereof, and alleging that the resolution of the 14th March was null and void, and the County Council had no right to pass such a resolution, and could not as they attempted to do, without notice and without the formalities required by law, rescind their previous action. That no such formalities were observed and

consequently the proceedings were null, and asking to have it so declared.

To this respondents plead, first, by exception *à la forme*, alleging several reasons, but in substance two grounds only which were relied upon at the argument:—

1st. That the petition was not sufficiently *libellée* (art. 700 M. C.)

2nd. That no substantial injustice had been alleged.

As to the first the facts are simply stated; the establishment by *procès-verbal* of a road in which Petitioners say they are interested, "its closing" by resolution, it is alleged without notice and without any of the formalities required by law. The question as far as this objection goes becomes simply a legal one. Do the grounds sustain the conclusion? If true, I think they do. What I am under this called upon to declare is, under the statement of the petition (and this cannot be extended or other grounds urged): Was the action of the Council illegal or not?

As to the second ground it is not in my opinion necessary, even under the omnibus saving clause of M. C. 16, which requires the allegation of substantial injustice if it appears that an illegal action had been taken by the Council; as, for instance, if in this very case it was necessary to give notice and amend or annul with the same formalities as had been taken to establish the road a mere resolution would come under the latter part of art. 16. I therefore dismiss the exception *à la forme*.

The respondents have pleaded to the merits:—"You are not municipal electors and all our proceedings are regular and legal, the resolution was legally passed," &c.

Now in this case I have nothing to do at present with the legality or illegality of the first proceedings. I am not called upon to examine them in any way. I have simply to say, 1st. Have the petitioners a standing in this court as municipal electors which enables them to prosecute it? Respondents say not, because they have not proved directly that they are British subjects or have paid their taxes. The Secretary-Treasurer of the Municipality has been examined and swears that they are municipal electors. I think though this evidence is general that in the present case, where the objection is raised by re-

spondents only at the hearing and under the general issue, and they do not cross-examine or in any way attempt to show want of status, it is sufficient under the pleadings.

Then we come to the second ground; Was the proceeding legal? Can the Municipal Council by resolution annul a *procès-verbal* establishing a road?

Article 460 M. C. declares what powers they may exercise by resolution; 526 and 527 the only sections referring to roads and it is there stated that every Local Council may by by-laws order the opening, construction and maintenance of public roads or bridges, widening, altering, or change of position of roads or bridges. Query—Does this apply to County Councils?

In this case it is immaterial, as in no event does it give power to close roads established by *procès-verbal*, by resolution; while on the other hand Art. 810 says, every *procès-verbal* may at any time be amended or repealed by another *procès-verbal* drawn up in the same manner, on petition by the parties interested, or under order of the Council 810 a. Every *procès-verbal* may be amended by the Council by by-law. Is power given anywhere under the Code to rescind or amend a *procès-verbal* by resolution without notice? If so, I have been unable to find it, and many years ago, for example, in the case of the Wellington Street extension in Sherbrooke, I advised the closing of the road by the same formalities by which it had been homologated as the only means of doing it, and so it was done.

The Council cannot, *ex mero motu*, by a simple resolution close the highways of the county or rescind their own former acts.

The Petition is therefore granted and the resolution annulled with costs against respondents.

Since preparing the above my attention (in the course of an argument relating to the same matter in another Court) has been directed to a decision of the Court of Queen's Bench, which fully sustains the position I have taken with regard to the nullity of the resolution attacked. (*Holton & Atkins*) 3 Q. L. R. 289.

Maclaren & Leet, for Petitioner.

H. B. Brown, for Respondents.

The Legal News.

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CONSTITUTIONAL CASES BEFORE THE PRIVY COUNCIL.

The following is a list of cases involving questions as to the respective powers of the Dominion Parliament and of the local legislatures decided up to the present time, indicating where reported :—

The Queen & Coote, 11 March, 1873, L.R. 4 P. C. 599, 18 L. C. J. 103.

L'Union St. Jacques & Belisle, 8 July, 1874, L.R. 6 P. C. 31, 20 L. C. J. 29.

Dow & al. & Black & al., 5 March, 1875, L.R. 6 P. C. 272.

The Attorney-General for the Province of Quebec & The Queen Insurance Company, 5 July, 1878, 3 H. of L. & P. C. 1090, 22 L. C. J. 307, 1 Leg. News, 410.

Valin & Langlois, 13 December, 1879, 5 H. of L. & P. C. 115; 3 L. N. 38.

Bourgoin & La Cie. du Chemin de fer, 26 February, 1880, 5 H. of L. & P. C. 381, 24 L. C. J. 193, 3 Leg. News 178.

Cushing & Dupuy, 15 April, 1880, 5 H. of L. & P. C. 409, 24 L. C. J. 151, 3 Leg. News, 171.

The Citizens' Insurance Company & Parsons. The Queen's Insurance Company & Parsons, 26 November, 1881, 7 H. of L. & P. C. 96, 5 Leg. News, 25.

Dobie & The Board of Temporalities, 21 January, 1882, 7 H. of L. & P. C. 136, 26 L. C. J. 170, 5 Leg. News, 58.

The Western Counties Railway Company & The Windsor & Annapolis Railway Company, 22 February, 1882, 7 H. of L. & P. C. 178. *Nora*.—In this case the question of respective powers was raised, but was not adjudicated upon by the P.C.

Russell & The Queen, 23 June, 1882, 7 H. of L. & P. C. 829, 5 Leg. News, 234.

The Attorney-General of the Province of Quebec & Mercer, 8 H. of L. & P. C. 767; 6 Leg. News, 244.

The Colonial Building & Investment Association & The Attorney-General of the Province of Quebec, 1 December, 1883, 7 Leg. News, 10.

Hodge & The Queen, 15 December, 1883. 7 Leg. News, 18.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, December 21, 1883.

DORION, C. J., RAMSAY, TESSIER, CROSE, BABY, J.J.

Ross et vir (defts. below), Appellants, and
Ross et vir (plffs. below), Respondents.

Executor—Removal for cause.

An executrix appointed her husband her attorney to manage the estate, and he made a lease which, in the opinion of the Court, was disadvantageous to the estate and for the purpose of deriving an unfair advantage, and also received bonuses on several occasions without accounting for them. Held, sufficient ground for removal of the executrix from office.

The appeal was from a judgment of the Superior Court removing an executrix. See 5 L. N. 197 for judgment in the Court below.

RAMSAY, J. This is an action to set aside an executrix. The appellant is the sole surviving executrix of the will of the late John Ross, and the appellant and the respondent are the remaining legatees under the will.

The complaint of the respondent is :—1. That appellant had given a power of attorney to her husband to manage the estate in violation of the terms of the will.

2nd. Fraud in charging the estate with sums not legally chargeable to the estate, in charging a commission to remunerate her husband for the management of the estate while paying one Tuggey a commission for the same services, in taking bonuses for leases granted, to wit, from Stearns and Murray \$500, and from Hart and Tuckwell \$500,—in making a fraudulent lease to one Miss Cressy at a notoriously insufficient rent, to the injury of the estate,—in agreeing to pay \$1200 to Hart and Tuckwell for the cancellation of the lease of part of the estate.

3rd. Waste in pulling down and erecting buildings on the estate.

The appellant denied all this waste and fraud, and maintained that she had a right to give her husband a power of attorney.

The evidence is very voluminous and in many parts of it rather difficult to be understood.

With regard to the first point respondent relies on these words: "And it is further—more my will and wish that neither of the husbands of any of my said daughters, nor any of my daughters' future husbands shall have any power over, control or interference in any manner with the foregoing devise and bequest to them, but shall be as absolutely free from such power, control or interference as if they had remained unmarried and single."

We do not think that the interpretation to be put on that clause is that the wife shall not be aided in her administration by her husband, but that the husband shall not have the control of his wife's share of the estate.

Before proceeding to examine the evidence it is necessary to examine a grievance complained of by appellant. She complains that the testimony of her husband should not have been excluded, and that it was competent to the Court, to allow the husband to be so examined. The appellant relies on the art. 252 C. C. P. and on 35 Vic. c. 6, sec. 9. We need not enter upon this question in the present case, for the judge has not permitted the introduction of this evidence, and we do not think that under the circumstances it would be our duty, even if we had the power, to send back the record in order to allow Dr. Thayer to be examined. It is evident from his wife's testimony that he is the party to blame, if blame there be, and allowing him to speak would simply be permitting him to disculpate himself under oath. It is unnecessary for us, therefore, to determine in the present case, whether appellant is strictly right in saying that the terms of the Act allow the wife to examine her husband as her witness if he be her agent. But the words of the statute are, "Whenever such examination shall be allowed, it shall be as unrestricted as would

have been that of the other consort, whether as regards the admissibility of verbal evidence or otherwise." How far is the evidence of the other consort unrestricted? So far and no further can the husband, agent, be examined.

The evidence of Mrs. Thayer, covering twenty-one pages of the factum of respondent, is next to valueless. It confirms what the appellant does not seek to conceal, that she knows personally little or nothing of the affairs of the estate. Her husband manages everything with her consent, and if his administration is bad she is responsible. On one point her evidence is important, it is as to the ring given her by Mr. Decker. But we do not think this gift can be characterized as evidence of fraud. The acceptance of a present of this sort would require to be brought into connection with some sacrifice of the interests of the estate to warrant a Court in presuming it to be fraudulent.

The charge most insisted on at the argument was the transaction with Miss Cressy. It seems this person has been living in Dr. Thayer's house as "a lady friend" off and on for nearly nine years, it would seem almost all the time she has been in Canada. Who she is, how she came to be an inmate of Dr. Thayer's family, is surrounded with some mystery. They became acquainted, so far as we can learn, in an hotel, and her position in the family is not that of a servant. She receives no remuneration. It is not said that she is a boarder, but we are told she is a person of private means. One thing, however, is evident, she has been an inmate of Dr. Thayer's house for years, and while residing there on the 30th April, she leased from him a vacant lot of land for five years, on the condition that she should pay the taxes, that she should expend \$600 on buildings on the property, that she should pay no rent for the first two years, and \$50 a year for the last three. Within four days—on the 3rd May following—Miss Cressy re-leased these premises to Mr. Foley for five years for \$500, and she got from him \$250 cash in advance. She swears at first that she made the bargain with Foley herself, but being pressed, it turns out that Dr. Thayer opened communications between them with regard

to the re-lease. Foley is examined as a witness, and he tells us that he leased the premises from Dr. Thayer, and that he was to pay the rent to Miss Cressy; that it was about the middle of April negotiations with Thayer began, and it was not till fifteen days after he had leased the premises from Thayer that he ever saw Miss Cressy. He says: "I never saw her until the day I went and signed the lease at the notary's office, and I did not know who she was." Again he says, he supposed he was dealing with Dr. Thayer. "I did not know Miss Cressy." Until the day he signed the lease Dr. Thayer had not mentioned Miss Cressy's name to him, and he had not heard of her.

The appellant explains the transaction in this way. It is said that this property was producing no rent, that it was a charge to the estate, that the heirs could not agree among themselves as to borrowing money to build, and that therefore Dr. Thayer had resolved by getting Miss Cressy to enter into this lease to turn the property to account without borrowing. It is contended that the estate was relieved from taxation for five years, that it directly gained by rent \$150, and that the building belonged to the estate at the end of the lease. It is also said that the estate could get back the property at any time by repaying to Miss Cressy what she had expended.

This is all very plausible, but it is not unanswerable. So long as Dr. Thayer manages the estate, there is no fear of the lease being broken, and if it were, it would only be on the repayment to Miss Cressy of what had been expended—not of \$600. It is evident that the danger of the lease being broken in the interest of the estate was not contemplated as a possible contingency, for the lease to Foley was for two years positively, and for three years more at Foley's option. Two other curious pieces of evidence leaked out. The insurance of the new building was in Dr. Thayer's name, and he paid the assessments. This was at first attempted to be concealed or denied. It also appears that Foley had offered to build on the premises and to give \$300 for a lease of five years. His sincerity in this respect is not to be

questioned, for he has actually agreed to give Miss Cressy a great deal more.

We therefore think that a bargain disadvantageous to the estate has been entered into designedly with the intention either of favouring Miss Cressy at the cost of the estate, or of allowing Dr. Thayer or his wife to gain an unfair advantage through a person *interposé*—Miss Cressy.

The Stearns and Murray story really includes the charge of having received two sums of money. It is said that in 1877 one Decker having failed, Stearns and Murray, who held the lease of the Albion Hotel with Decker, desired to hold the lease in their own names; that Thayer would not consent unless they gave him \$500, and that they ultimately gave him \$150 and discharged his bill at the hotel for \$147.

The story is scarcely denied, but it is attempted to be proved by one of the partners, Stearns, that this was done to indemnify Dr. Thayer for the expense of coming out from England to settle difficulties as to this lease. Stearns denies this, and at any rate an expenditure of this sort should have appeared on the books.

The other transaction with Stearns and Murray was two years later, when they wanted to renew their lease, and then they gave Thayer a cheque for \$280 and \$20 as a bonus for the lease. This again it is attempted to explain by saying that Thayer wanted \$3,000 a year for the Albion, and that Kerby was willing to take \$2,500; and that Thayer then said if Kerby was satisfied with \$2,500 they might have it for that, but that he must be indemnified by getting \$300. But it is evident a co-proprietor acting as agent, cannot make a bargain of that sort without the positive consent of the other proprietor.

A witness, Tuckwell, says that he and his partner Hart paid Thayer \$500 to get a 12 years' lease of the premises they had of the estate at the rate of \$1200 a year, and that subsequently Thayer got them to cancel their lease on receiving the \$1200 they had paid for rent and bonus back again. It is contended on the part of respondent that this \$1200 was all charged to the estate, but that the \$500 was not credited to the estate.

I have not been able to trace the whole of

this transaction satisfactorily so as to say that it is proved that the \$1200 was charged to the estate. The fact is the record is very inconveniently made up, and several papers I wished to see so as to be able to speak of them from positive inspection, I could not find. One, a note, an important paper, has evidently not been sent up, and there is no copy of it. Nevertheless we think it established that Dr. Thayer got the \$500 and did not account for it for about two years.

The defendant has established that in many respects, the estate was well and profitably managed by Dr. Thayer, and that the charge of waste, in the sense of doing useless work, is not made out. Neither do we find any payments have been improperly made. And here we may say that we should not feel disposed to set aside an executrix, daughter of the testator, herself a legatee, on the evidence of small payments which might have been avoided. Nor do we think that the payment of a commission to Dr. Thayer for appreciable services, such as collections, would be a ground for displacing the executrix selected by the testator.

But we think the judgment should be confirmed on account of the Cressy transaction, and the taking of bonuses on several occasions without accounting for them.

Judgment confirmed.

J. L. Morris for appellant.

Kerr & Carter for respondent.

SUPERIOR COURT.

SHERBROOKE, November 10, 1883.

Before BROOKS, J.

Ex parte EDSON, Petr. for *certainari*, and THE CORPORATION OF HATLEY, Respondents.

Quebec License Act of 1878—Sale of intoxicating liquors—Art. 561, Municipal Code.

1. Although the local legislature has no authority to prohibit the sale of intoxicating liquors, it has power to make laws regulating the traffic therein, and to raise revenue for provincial purposes by restricting to license holders the right to sell liquor.
2. A municipal corporation has no power under art. 561 of the Municipal Code, to prohibit the sale of intoxicating liquors within the limits of the municipality.

The petitioner had been convicted and fined \$75, on complaint of the respondents, for selling intoxicating liquors without a license.

PER CURIAM. The local legislature may not prohibit, but it may legislate exclusively upon this subject for the purpose of raising a revenue for provincial, local or municipal purposes. The Quebec License Act of 1878, 41 Vict. cap. 7, enacts that whoever sells intoxicating liquors in any organized territory in this Province, outside of Montreal, without a license to that effect still in force, shall be liable to a fine of \$75. The Court holds this provision not *ultra vires*.

It is said that the Municipal Council of the Township of Hatley, under Sec. 561 of the Municipal Code, had prohibited the sale within their territory. They could not legally do this, and what the petitioner had to do was to get the necessary certificate, present it to the Council, and demand its confirmation; and, if refused, either proceed by *mandamus* to enforce its confirmation, or, on establishing such refusal, tender to the local government or to its license inspector the amount due for provincial revenue purposes, and demand the license; but the petitioner cannot come forward and say that he has a right to sell without any license and without the payment of any duty.

Petition rejected.

J. L. Terrill and J. W. Merry for petitioner.
W. White, Q. C., for respondents.

COUR SUPÉRIEURE.

SOREL, 4 octobre 1883.

Coram GILL, J.

BAZIN V. LACOUTURE, *de-gual*.

Procédure—Huissier—C. P. C. 74.

JUGE:—Que la prohibition de l'Art. 74 du C. P. C. ne s'applique pas au cas où l'huissier qui a fait l'exploit d'assignation, a instrumenté contre ses parents ou alliés.

Le jugement est comme suit:

"La Cour ayant entendu la plaidoirie contradictoire des parties sur le mérite de l'exception à la forme;

"Considérant que la dite exception est basée sur le moyen unique que l'assignation est nulle parceque l'huissier qui a signifié l'exploit est marié à la cousine-germaine de la défenderesse ;

"Considérant que les raisons qu'il y a de défendre aux huissiers d'exploiter pour leurs parents n'existent pas lorsque, comme dans cette cause, ils instrumentent contre leurs parents ou alliés et que, partant, la prohibition portée en l'article 74 du C. P. C. ne doit pas, en pareil cas, recevoir son application, a rejeté et rejette la dite exception à la forme comme mal fondée, avec dépens."

Exception à la forme rejetée.

A. Germain, C.R., pour le demandeur.

J. B. Brousseau, pour la défenderesse.

(A. G.)

COUR SUPÉRIEURE.

MONTREAL, 20 février 1884.

Coram TORRANCE, J.

DEBROSIERES v. LESSARD.

Inscription à l'Enquête—Délai de l'avis—Art. 235 C. P. C.

Le 11 février 1884, le défendeur a fait signifier au demandeur l'inscription suivante : "Nous inscrivons la présente cause sur le rôle des Enquêtes, pour l'Enquête du demandeur, pour jeudi, le quatorzième jour de février courant."

Motion de la part du demandeur se lisant comme suit : "Attendu que le défendeur n'a pas accompagné son inscription de l'avis requis par la loi ; attendu que les délais entre la signification de la dite inscription et le jour fixé pour l'Enquête (8 jours, art. 235 C. P. C.) sont insuffisants, conclut, etc."

Le défendeur répond en citant la 41^{ème} règle de pratique de la Cour Supérieure, qui dit : "Aucune preuve ne sera reçue dans une cause contestée, à moins que deux jours en terme ou huit jours en vacance ne se soient écoulés entre l'avis de telle inscription et le jour fixé pour faire la preuve." Le demandeur réplique en disant que la règle de pratique n'a pu avoir pour effet de changer ou modifier le texte de la loi qu'il appartient à la législature de changer.

PER CURIAM :—"La Cour, parties ouïes sur

la motion du demandeur du 15 février courant, demandant pour les causes et raisons ci-énoncées en icelle motion, que l'inscription par le défendeur sur le rôle des Enquêtes pour l'Enquête du demandeur pour le 14 février courant, soit rayée du dit rôle des Enquêtes, ayant examiné la procédure et délibéré, accorde la dite motion ; en conséquence, ordonne que la dite motion à l'Enquête soit et elle est par les présentes rayée et biffée du dit rôle, à toutes fins que de droit, avec dépens." *Vide* 21 L. C. J. p. 39.

Lareau & Allard, pour le demandeur.

Globenski & Poirier, pour le défendeur.

SUPERIOR COURT.

MONTREAL, February 23, 1884.

Before TORRANCE, J.

Ex parte ISIDORE DAoust, père, petitioner, and CORDELIE LEBœUF, tutrix, *mise en cause*.

Procedure—Action against tutor.

A tutor cannot be impleaded except by writ in the ordinary form.

The question here was as to the summary removal of a tutrix for misconduct in her office.

The petitioner who was the sub-tutor presented a petition to the judge in chambers, who gave an order summoning the tutrix to appear on Friday the 22nd February, instant, before the Court.

The defendant appeared and made a preliminary objection to answer, there being no writ issued against her summoning her to appear.

PER CURIAM. The directions of our codes appear to be very plain. By C. C. 286-289, "actions for the removal of tutors may be brought before the Court, by any one related or allied to the minor, by the subrogate tutor, or by any other person having an interest in such removal." "May" is used, which is permissive. C. C. 289. "During the litigation, the tutor sued retains the management and administration, &c., unless the Court orders otherwise." The French version says : "La demande se poursuit devant le tribunal." It is directory or obligatory. Again, the word "Court," "*tribunal*," not "judge" is used. Turning now to the C. C. P. for the

procedure, by C. C. P. 28, "The Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court or of the Admiralty." The French version says: "toute demande ou action." C. C. P. 43. "Every action before the Superior Court is instituted by means of a writ of summons, in the name of the Sovereign: saving the exceptions contained in this code, and other cases provided for by special laws." C. C. P. 75 specifies the delays for different proceedings. I find no special rule for demands against tutors.

Turning now to the jurisprudence, there is no case reported since the Code, that I know of. In 3 Rev. de Lég. 365, *Darvaux v. Fournier*, A.D. 1819, at Quebec, the Court intimates that a tutor should be removed by an action *en destitution*. It refers to a case at Montreal in 1741, reported in the edits and ordonnances 2, 202, edition of 1806, and finally settled by the Conseil Supérieur: *Nouv. Den. vo. Curateur*, 716. These show the procedure as to the merits, but the writ is an English proceeding adopted by our Code. Before the Code, namely in 1865, there is the case of *Stephen v. Stephen*, 1 L. C. Law Journal, 98, where the procedure now under consideration would appear to be approved of. As to the use of the word "Petition" or "declaration" I see no difference between the two. The question is whether the tutor can be brought before the Superior Court except by a writ without violation of the rules of our Codes. I think he cannot, and therefore the petition is dismissed.

Goyette for petitioner.

Bergevin for tutrix.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, February 4, 1884.

Before TORRANCE, J.

Ex parte EMBELINA VALIQUETTE, petitioner.

Curator—Mother appointed curatrix to absent son.

The petitioner asked for the appointment of a curator to her absent son. The family council chose the petitioner, his mother, as curatrix. The advice of the council was

homologated by the Judge, who held that as the petitioner could be elected tutrix to her minor children, she could also be elected curatrix to her absent son and administer his estate in his absence.

Bauset for petitioner.

SUPERIOR COURT.

MONTREAL, January 30, 1884.

Before TORRANCE, J.

ROLLAND V. CASSIDY.

Mediators—Proceedings of—Validity of award.

The action was to set aside an award of arbitrators and *amiables compositeurs*. The parties, Rolland and Cassidy, with one Adolphe Roy, went into partnership as wood merchants, in November, 1874. The partnership was dissolved in November 1881, and three arbitrators agreed upon between Rolland and Cassidy by deed of date 21st November, 1881, Roy having previously withdrawn by going into insolvency. An award was made on the 13th March, 1882, and Rolland found debtor of Cassidy for \$11,000.

Rolland objected to the award on several grounds. 1. The conditions of the *compromis* were violated by Mr. Cassidy, giving him an advantage over Mr. Rolland. 2. There were fatal irregularities in the proceedings before the arbitrators and in the award.

As to the conditions of the submission, it was agreed that neither of the parties should be represented by an attorney or advocate before the arbitrators. It was charged that this condition had been violated. The irregularities complained of in the arbitration were—1. That the arbitrators had not been sworn. 2. The arbitrators had not sworn the witnesses; they had not taken notes of the evidence. The depositions had been taken by stenography. 3. The arbitrators had refused to hear witnesses for Rolland. 4. They had acted with partiality. 5. On the suggestion of Cassidy they had taken the opinion of his lawyer in the absence of plaintiff and of the other arbitrator, Mr. Grier, after a false statement of facts made by Mr. Cassidy.

PER CURIAM. I do not find that the condition of the submission was violated by the presence of lawyers. It is true that the opinion of Mr. Lacoste on one side and of Mr. Greenshields on the other, and also of Mr. Trenholme, had been taken as to whether Mr. Rolland was an agent for the partnership. I see no violation here. As to the irregularities complained of, I find, contrary to what the plaintiff has said, the arbitrators were sworn. The witnesses were sworn. Abundant notes of the evidence were taken by stenography. The fullest latitude was accorded the parties to produce witnesses. The only one they did not hear, and the three arbitrators seemed here to be of one mind, was Mr. Taillon, offered on some question of law. I have looked over the award and find it of the most elaborate character. Each party produced his factum and had the fullest hearing before the award was prepared, and no complaints were made till one side was condemned in a larger sum than he would submit to. *Hinc illæ lacrymæ.*

As to the rules governing proceedings before mediators, *vide* 2 Jousse, Justice Civile 717, n. 82; Guyot, Arbitrage, 548.

Action dismissed.

Mousseau & Co., for plaintiff.

Lacoste & Co., for defendant.

COURT OF REVIEW.

MONTREAL, January 31, 1884.

Before TORRANCE, DOHERTY & JETTÉ, JJ.

POIRIER v. MONETTE.

Damages—Excessive demand—Assessment of damages—Costs.

The judgment appealed from was rendered by the Superior Court (Belanger, J.) Beauharnois, Nov. 28, 1882.

TORRANCE, J. This was an action of damages for assault and battery. The action was dismissed because the evidence was contradictory. We find enough in the evidence to prove that plaintiff had a grievance, though a small one. At the celebration of the picnic of the Society of St. Jean Baptiste, the plaintiff was employed to keep order, and defendant without warrant interfered with

the fulfilment of the programme and resisted the plaintiff in the performance of his duty as constable. The case should never have been in the Superior Court. Here we find for the plaintiff and assess his damages at \$20 and \$20 costs. We give him no more, for the complaint should have been made before a Magistrate's Court.

Judgment reversed.

T. Brossoit, for plaintiff.

J. K. Elliott, for defendant.

CIRCUIT COURT.

RICHMOND, January 22, 1884.

Before BROOKS, J.

WOODWARD v. THE CORPORATION OF RICHMOND.

Procedure—Resolution of County Council—M. C. 1061.

A resolution of a county council rescinding a procès-verbal is not a "decision," within the meaning of Art. 1061 of the Municipal Code, from which an appeal lies to the Circuit Court.

PER CURIAM. This is an appeal from a resolution of the Municipal Council of Richmond County under 1061 of the Municipal Code, asking to have it annulled. To this respondents have pleaded *inter alia* by an exception to the form, that said resolution is neither a "decision" nor a "judgment" such as is the subject of an appeal to this court.

Sub-section 2 of Art. 1061 is in these terms: "An appeal lies to the Circuit Court of the county or district from every decision given by a County Council respecting any *procès-verbal* made and homologated under the authority of such Council sitting otherwise than in appeal." Now the question in this matter is raised: Is this such a decision as is contemplated? I am of opinion that the Code refers to decisions of the County Council with regard to the proceedings of the Council respecting such *procès-verbal* up to the time it has been homologated and not afterwards, and not to independent resolutions which subsequently may affect such *procès-verbal*. Now Art. 100 has provided for the setting aside of any resolution on petition as provided by Art. 698, and that evidently was the course contemplated by the Code. The

resolution in question was a resolution assuming to rescind all action theretofore taken, but it appears from the proceedings that the *procès-verbal* in question had been completed, i.e., made and homologated, and notice of the homologation given months before this resolution. In this matter I am not now called upon to decide as to the legality of the resolution, but simply to declare whether an appeal is the proper mode of attacking it. I think not; I think it does not come under the provision of the Code, and consequently the appeal is dismissed with costs.

Maclaren & Leet, for appellant.

H. B. Brown for respondent.

RECENT ENGLISH DECISIONS.

Trade mark—Innocent purchaser for private use liable for infringement.—In an action by a firm of cigar manufacturers for an injunction to restrain the defendant, who had bought 5,000 cigars for private purposes, from selling or parting with them in boxes bearing a colorable imitation of the plaintiffs' registered mark or brand; for the destruction of the boxes, and for damages; and where the plaintiffs on having learnt that the boxes bearing the spurious marks were warehoused at the docks to the order of the defendant, had served him with the writ in the present action without notice; and where the defendant had already assented to an order being made against him in the terms asked by the plaintiffs; the defendant moved the court that he might not be compelled to pay the plaintiffs' costs as he was ignorant of all matters concerning the alleged spurious trademarks, and was an innocent purchaser of cigars for his own private purposes, and had committed no infringement. Held, that the defendant had used the plaintiffs' particular trade-mark, and was guilty of infringement; that it was not necessary and would have been unwise of the plaintiffs to have given the defendant notice before the issue of their writ in this action; that though the defendant might be an innocent purchaser, and never have intended to infringe the plaintiffs' trade-mark, he must pay the plaintiffs' costs. (Ch. Div., June 22, 1883.) *Upmann v. Forster*. Opinion by Chitty, J. (49 L. T. Rep. [N.S.] 122.)

Conflict of law.—Legacy to alien female infants married.—A legacy had been paid into court, to which, on the death of the tenant for life, two female infants, who were French subjects by birth, and resident in France, became absolutely entitled. They were both married, and by the French law under the settlements made on their respective marriages, their husbands were absolutely entitled to receive their shares of the fund. One of the infants had since attained twenty-one. Held, that the infants not being subjects of or domiciled or resident in England, the court had a discretion as to whether or not they should be treated as wards of court, and that the money might therefore be paid out to the husbands. (Ch. Div., Aug. 3, 1883.) *Brown v. Collins*. Opinion by Kay, J. (49 L. T. Rep. [N.S.] 329.)

GENERAL NOTES.

The throne of England, so splendid when covered with silk velvet and gold, is in fact only an "old oak chair" over 600 years in use for the same purpose. Its existence has been traced back to the days of Edward I. The wood is very hard and solid; the back and sides were formerly painted in various colours, and the seat is made of a slab of rough-looking sandstone, 25 inches in length, 17 inches in breadth, and 19½ inches in thickness, and in this stone lies the grand peculiarity of the chair. Numberless legends are told in connection with it, the truth probably being that it was originally taken from Ireland to Scotland, and served at the coronation of the early Scottish Kings.

The annual report of the Montreal Board of Trade contains the following on the subject of insolvent legislation:—"At the last session of Parliament a bill was introduced by Mr. Curran to provide for the equitable distribution of the assets of insolvent estates. It had the approval of your Council, but the late date at which the measure was introduced prevented its being dealt with before Parliament rose. Since then, in connection with a similar measure prepared under the direction of a committee from the Boards of Trade of Toronto and Hamilton a conference was held at Toronto, at which this board was represented. A committee representing the three boards was then appointed to consider the points of difference in the two bills with a view to their amalgamation. The result has been to unite all parties upon one measure which has been submitted to the ministers at Ottawa by a deputation on which the committee on insolvency of your Council acted. The necessity for the enactment of the measure was fully set forth and there is reason to hope that the Government will not permit the coming session of Parliament to pass without legislating for the removal of the injustice at present suffered by the mercantile community in consequence of the absence of such a measure as that which has been prepared."

The Legal News.

VOL. VII. MARCH 8, 1884. No. 10.

GOWNS FOR JUDGES.

A tremendous revolution has taken place, and nobody is hurt. The question of gowns or no gowns for the judges of the New York Court of Appeals has been warmly debated for some time by our contemporaries in the United States, and we suppose also to some extent by the bar. The State Bar Association of New York passed the following resolutions :—

Resolved, That the example of the Supreme Court of the United States and of other courts in our country in retaining the use of the black silk robe when in session is in accordance with the historical traditions of our judicial institutions and agreeable to a cultured public taste.

Resolved, That their Honors, the Chief Judge and the Associated Judges of the Court of Appeals of this State, be and are memorialized on the subject, and respectfully recommended favorably to consider the adoption by them of similar robes when sitting *en banc*.

These resolutions were formally presented to the bench on the 15th of January last, and the result was that on the 25th of February the judges came into Court robed. The excitement which this little incident has created is altogether out of proportion to its importance. The *American Law Review*, with its well-known horror of "dudism," of course protests strongly against the innovation. "Our people have an innate abhorrence of show and shams," cries the *Review*. We are glad to be informed of this fact, as we should otherwise never have guessed it, more especially when we behold the panoply and fuss of the Knights Commanders and Grand Knights Commanders, etc., who sometimes make an irruption into Canada. The *Albany Law Journal* takes a common-sense view of the matter, and holds that while the putting of judges into gowns will not make them abler, more learned, or more honest, "it will make them more respected by the mass of mankind, who view forms with awe." It may also be remarked that it enforces a decent uniformity, and prevents judges from gratifying, while on the bench, any personal fancy for startling garments. We have read

that at one time in Scotland, while a French invasion was expected and the volunteer fever ran high, barristers sometimes came into Court from the drill ground, with a blazing scarlet uniform under their robes. If gowns had not been worn, the uniform would have had no seemly covering. It is easy to imagine that in some communities the varieties of costume dictated by individual caprice might be overpowering. The gown is convenient and becoming. The *Albany Law Journal* says "the change of dress is scarcely noticeable, but looks well on scrutiny." That is complimentary to the good taste of the Court as to the dress previously worn. But our contemporary is not without thrills of apprehension, for he adds: "Now we expect that the next breeze that blows from the west will bring to our ears the clash of resounding quills of legal editors who see in this change of garb a shaking of the pillars of the State."

BUSINESS IN APPEAL.

The terms of the Court of Appeal which have now been held in Montreal during four months in succession, afford some data of interest in relation to the progress of business in the Court. We find that the last case on the September (1883) list, numbering 106 cases, was the 88th on the November list, the 64th on the December list, 35th on the January list, and was heard as the 12th case on the February list. Between September and November, 1883 (two months), 28 new cases were inscribed; from November to December, 13 new cases; from December to January, 16 cases; from January to February, 14 cases. This shows an average of about 14 cases per month. Now it takes about four days to hear 14 cases; so that if the four days' system were adopted, the Montreal cases might be heard in a monthly term of four days, say from the 1st to the 4th inclusive; and the judgments could without difficulty be rendered at the end of the month. During the summer vacation months of July and August, there might be an accumulation of perhaps 15 or 20 cases extra; but this would merely involve a lengthening of the September term to seven or eight days.

INTERCHANGE OF COUNSEL.

Ontario is about to take from us a good and able member of the Quebec bar in Mr. J. J. Maclaren, who goes to Toronto to take the place in a prominent firm vacated by Mr. Rose, who was recently appointed to the bench. We avoid in this journal as far as possible matters merely personal, or we should be disposed to say more of an incident which is not without some significance. Ontario, on the other hand, gave to our bar several years ago a counsel of some prominence in Mr. J. C. Hatton. Both gentlemen are Queen's Counsel under Provincial authority, and we fail to perceive any reason why the Provincial appointment should not be confirmed by the Dominion Government. We protested some time ago against the exclusion of Mr. W. W. Robertson, then *Bâtonnier* of the Montreal bar, from the same honor. That omission has since been rectified, but his successor as *Bâtonnier*, Mr. Geoffrion, is not a Q. C. of the Dominion. We are entirely convinced that the appointment of Queen's Counsel would not be one whit less respectable if it ceased to be confined to so great an extent to those who have done service on the stump to the party in power. The fault has been common to both sides.

THE LATE MR. GEORGE OKILL STUART.

Mr. George Okill Stuart, Judge of the Vice-Admiralty Court at Quebec, died in that city on the 5th instant. The deceased was a son of the late Archdeacon Stuart, of Kingston, and nephew of the late Sir James Stuart, Chief Justice of Lower Canada. His grandfather, the Rev. John Stuart, was a clergyman of the Church of England, who, at the close of the revolutionary war, left the United States to settle in Canada. His mother was a daughter of General Brooks, for several years Governor of the State of Massachusetts. Mr. Stuart was educated partly in Kingston and partly in Quebec. Having chosen the law as a profession, he pursued his studies with his uncle, afterwards Sir James, and was called to the bar in 1830. From 1834 until 1838 he was in partnership with his uncle, who in the latter year

was appointed Chief Justice of Lower Canada. In 1846 Mr. Stuart became Mayor of Quebec, and filled the office until 1850. A year or two later he was elected by a considerable majority to represent the same city in the Legislative Assembly, and held the seat, with a short intermission, until 1858. He then retired from political life and devoted himself entirely to his profession, in which he was eminently successful. In 1873 he was appointed Judge of the Vice-Admiralty Court at Quebec, an office which he filled with much ability up to the time of his death.

The name of Mr. Stuart is also familiar to the profession as a reporter. In 1834, shortly after his call to the bar, he published a volume of reports of cases determined in courts of the province; and subsequently in 1858 and 1873 he published two volumes of Admiralty Reports, embracing decisions by Mr. Black, whom, as we have mentioned, he succeeded in 1873.

Mr. Stuart had entered upon his seventy-seventh year. In 1833 he married Margaret B. Stacy, a niece of Mr. Black, who survives him.

NEW PUBLICATIONS.

COMPENDIUM OF DOMINION LAWS OF CANADA, 1867-1883, in force on the first day of January, 1884, indicating Amendments, Repeals, &c., with Index. By J. Fremont, A.B., LL.L., Barrister. Montreal: A. Periard, publisher.

This is a work by a member of the Quebec bar, the useful character of which is indicated by the title. It is in three parts, the first of which contains a list of the Statutes of Canada from 1867 to 1883, indicating chapter by chapter and section by section the law as it was in force on the 1st of January of the present year. The second part comprises (1) a list of Statutes of Canada (1867-1883), repealed, expired or effete; (2) a list of Acts passed previous to Confederation which have been repealed by Statutes of Canada. (This list does not comprise Acts within the jurisdiction of Provincial Legislatures repealed by Provincial Acts.) (3) Acts passed previous to Confederation which have been amended by Statutes of Canada. The third part consists

of an Index to the Public and General Acts of the Dominion of Canada which are now in force.

A work of this nature involves very considerable labor, and should receive the cordial support of the profession. Some years will probably elapse before the official consolidation is completed, and until that work is brought to a close Mr. Fremont's Compendium cannot fail to be of the greatest service in facilitating the examination of statutes and saving many tiresome searches. The book is well printed and handsomely bound, uniform in style with the volume of *Condensed Reports* recently reprinted by Mr. Periard.

THE MANITOBA LAW JOURNAL AND LAW REPORTS, edited by John S. Ewart, Barrister-at-Law. Winnipeg: Robert D. Richardson, Publisher.

The growth of the Prairie Province is indicated in a very marked way to legal eyes by the appearance of this new legal journal, of which the issues for January and February have reached us almost simultaneously. The *Manitoba Law Journal* comprises 16 pages monthly of articles and miscellaneous matter, and about 24 pages of law reports paged separately. We confess we were rather surprised at the advent of such a well-grown brother from the West. The editorial work appears to be ably and carefully executed, and in typographical as well as literary excellence, the *Law Journal* will compare very well with its older contemporaries.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before JOHNSON, TORRANCE & RAINVILLE, JJ.

WILLIAMS V. NICHOLAS.

Contract—Offer of Reward—Compliance with Terms.

The defendant offered a reward for information that would secure the conviction of the person who broke into his shop on the night of the 17th May and stole goods therefrom. The plaintiff gave information that his own nephew was the thief, and the latter was convicted on his own confession of larceny, as on 15th May. Held, that the plaintiff

was entitled to the reward, notwithstanding that the conviction was for larceny and not for breaking into a shop and stealing therefrom, and that the date was different from that mentioned in the offer of reward—more especially in the absence of proof that there were two offences committed about that time at the same place or that the person convicted was only a receiver.

The judgment inscribed in Review, was rendered by the Circuit Court, St. Francis, (Plamondon, J.) 16 June, 1883.

JOHNSON, J. The defendant had a store or shop at a place called Sawyerville in the District of St. Francis, and on the 18th of May he advertised and published an offer of a reward in the following terms: "One hundred dollars will be paid for information that will secure the conviction of the person or persons who broke into my store last night, and stole therefrom a number of watch chains, pocket knives, razors, &c.

JAMES NICHOLAS.

"Sawyerville, 18th May, 1882."

Soon afterwards the plaintiff communicated to the high constable that he had discovered the thief, and further went himself to the defendant, with the same information; but the defendant never came forward to make his complaint, and it was left to the High Constable to act upon the information he had received from the plaintiff. The thief was arrested and taken before the District Magistrate, and convicted on his own confession. The plaintiff then brought his action to get the reward, and the defendant pleaded, 1st. by what he calls in his *factum*, a very strong *défense en fait*, which was meant no doubt to conform to the law requiring an express denial of what is intended to be denied, while at the same time it eluded the law by not expressing or taking out of the aggregate of facts, those which he denied; but by denying them collectively, and saying he meant that to be a denial of each fact expressly and by itself. This, of course, is not what the law requires; but only shows that the party knowing what the law is, wants to substitute something else more convenient to himself. However, this sort of thing has been tolerated too long in this

court to complain of it now;—so we have first a plain statement by the plaintiff that he accepted this offer, and acted upon it, and gave the information, and that the guilty party was convicted; and it is met by this “very strong *défense en fait*,” which means, I suppose, to defy the plaintiff to prove his case; and then we have another plea alleging first, that before the advertisement was acted upon by the plaintiff, it was withdrawn; and, secondly, that the culprit who was denounced by the information given, was a nephew of the plaintiff, and that they acted in collusion.

As to the withdrawing the advertisement, there is no evidence at all that the defendant ever published any other to say that he withdrew his offer. There is only evidence that when it was rather late, and after the information sought by it had been tendered, it was taken down from the wall where it had been stuck up, and was put into the stove.

Then, as to the plea of collusion, it either means too much, or it means nothing at all. If it means that the plaintiff and his nephew contrived to share the reward by falsely putting forward as the thief an innocent person—it should have said so—for if he was not innocent, but was really the thief, there would be nothing wrong in the uncle exposing and bringing his nephew to punishment, however repugnant it might be to his feelings. On the other hand, it is just to say that it has been properly mentioned by the counsel for the defendant that the party instructing him lived at a distance, and that he admits the plea to be defective. There can be no doubt that under our law (see art. 984 C. C.) the publication of the offer by the defendant, and its acceptance by the plaintiff, constituted a contract between them; and the English cases are numerous to show the same thing. The only point is, did the plaintiff fulfil his part of it, for, if he did, the defendant must on his part be held to do the same.

The principal contention of the defendant was that he had offered a reward for one thing, and that the information given had led to another. He said he wanted information to convict the person or persons who broke into his store in the night preceding the 18th of May, and the conviction was only

for larceny—and larceny laid as having been committed on the 15th of May. Now I am disposed to think there would have been a good deal in this, if it could have been shown that there were two offences committed about that time and at this same place; or if it could be shown that the youth who was convicted was only a receiver; and some one else had broken into the shop, while the boy was only reputed the thief because he was found in possession of some of the things stolen. This boy might have been examined as a witness. He might have been asked who broke into the shop, and he might have answered (mind I am very far from saying that I believe it), but as a matter of exposition I am observing merely that he might have proved, if it was true, that his uncle was the person who broke and entered the shop, or the uncle might have been examined, for that matter. But whose fault is it that nothing of this sort has been done by the defendant who was called upon to defend this case efficiently or not at all? If he had no defence he should have offered none. Justice is not to be satisfied by suspicion or twaddle:—we want facts; and if the defendant has no facts to allege and to prove, that would be an answer at once to such a case as this,—and if he had any, it was for him to take the responsibility of putting them forward in the record, and proving them by evidence. We say if he has no facts to meet the plaintiff's case, the proof made by the latter is enough. Time was not of the essence of the offence. This was not a burglary, which is breaking and entering a dwelling house in the night, and stealing therein:—it was merely breaking and entering a shop, and stealing therein—and the day and night are the same in that case. The evidence of stealing a part of the goods would support a conviction for stealing the whole. It is impossible to say that the information given would not “secure the conviction of the person who broke and entered.” If it has not already led to such a conviction, it is not the plaintiff's fault. He gave the information; if the defendant has not applied that information properly, or made use of it so as to get a conviction such as he wanted, whose fault is that? Surely he cannot make his own omissions ground for refusing to fulfil his promise.

We confirm the judgment of the court below, which was for the plaintiff, with costs.

Judgment confirmed.

Camirand & Co. for plaintiff.

Merry & Co. for defendant.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before JOHNSON, TORRANCE & RAINVILLE, JJ.

THOMAS et al., es qual. v. COOMBE et vir, and AMES et al., opposants, and PLAINTIFFS contesting.

Lessor and Lessee—Privilege of Lessor.

Where it appeared that the effects seized by the lessor on the premises leased, consisting of horses and vehicles, were continuously in the possession of the husband of the lessee, though they were used by him in travelling most of the time, the exception mentioned in the latter part of Art. 1622 C. C., excluding effects transiently on the premises, was held not to apply.

JOHNSON, J. This is a contested opposition which was filed by Messrs. Ames, Holden & Co., claiming as their property a pair of horses, a wagon, a sleigh and a set of double harness, seized under process of *saisie-gagerie* by the plaintiff for rent or its accessories, and in possession of the defendants. The defendant Hall is the husband of the tenant; but that makes no difference, the domicile of the one being by law the domicile of the other.

There are two questions:

1st. Were the effects seized the property of the opposants?

2nd. Were they liable for the rent due to the plaintiff?

Without going minutely into all the details of the arrangement between the defendant Hall and his first employers, Wm. Ewan & Son, or into the arrangements he subsequently made with the opposants, the facts are incontestible that Hall was in the employ first of all of Ewan & Son, and afterwards of the opposants, and for the purposes of the business of these firms he had been equipped by their means with this property. The rights of the opposants in it were acquired when Hall ceased travelling for Ewan & Co., and entered into the opposants' service. They

acquired their rights from Ewan & Co., and their rights were not other or greater than those of the first firm. It therefore becomes comparatively unimportant to discuss what these rights were, except with reference to the question of ownership. But supposing the opposants to have been vested with an absolute right of property in these effects, the main question would still remain, viz., these things being seized in execution of a writ of *saisie-gagerie*, are they, or are they not, liable to be sold in satisfaction of the rent, whoever may be the owner, except under certain conditions? That is really the point, and the only point, for as to the right of the landlord depending on a presumption of ownership by the tenant—which presumption might disappear by proof to the contrary, there is no proof whatever of that kind; and as to collusion between the plaintiffs and the defendant Hall to deprive the opposants of their property, nothing of that kind is pleaded in answer to the contestation.

Now the law is this:—Art. 1619 C.C.: "The lessor has for the payment of his rent, and other obligations of the lease a privileged right upon the moveables found upon the property leased." This is the general rule or, at all events, the first part of the rule: the second part of it is found in another article, viz., Art. 1622:—The landlord's privilege "extends also to moveable effects belonging to third persons, and being on the premises by their consent, express or implied." Now for the exception:—"but not if such moveable effects be only transiently or accidentally on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired, or to an auctioneer to be sold." It seems to us that the learned judge who based his judgment on this part of the case on the idea of the transient or accidental situation of the goods did not give full and satisfactory effect to the evidence on that head. The evidence proves to us that the effects were always in the possession of Hall; he was using them on the road most of the time no doubt, and if at any such time he had happened to stop at an inn more or less distant from his home where they were seized in this case; if, I say,

they had, in such a situation as that, been taken and seized by the landlord in possession of the keeper of the inn for rent, their transient and accidental presence there would have liberated them from the lien of the landlord upon effects in his tenants' premises; but to say they were transiently or accidentally on the premises occupied by Hall, and where they always were kept when they were not actually on the road, is to make no difference between the words transient and permanent, and plainly to defeat the law. Therefore, owners or not owners, which it would be superfluous to discuss, Messrs. Ames, Holden & Co. have no right to withdraw from seizure at the suit of the landlord for rent, these things that have been taken in execution, and our judgment is to dismiss their opposition with costs, reversing the judgment below.

Judgment reversed.

Camirand & Co. for opposants.

Hall & Co. for plaintiffs contesting.

SUPERIOR COURT.

MONTREAL, March 5, 1884.

Before TORRANCE, J.

Ex parte JOSEPH HENRI PILLET, petitioner,
and Dame MARIE GEORGINA DELISLE,
mise en cause.

Procedure—Petition by husband for order to permit him to see his child.

Where judgment of separation from bed and board has been pronounced, the husband cannot on summary petition, not in a pending cause, without a writ of summons, obtain an order to permit him to see his child, the custody of which was given to the mother.

This was a petition presented to the Court by a husband against his wife for an order to permit him to see his child.

An action *en séparation de corps* had been instituted by the wife against her husband and decided in her favour on the 23rd June, 1883, giving her the custody of the child among other conclusions taken by her. A preliminary point was now before the Court, whether by a summary petition without a writ of summons, the Court had jurisdiction in the matter. The petition was not made in a pending cause.

PER CURIAM. This Court (Torrance, J.) decided on the 23rd February that it had no jurisdiction (*vide ex parte Daoust*, p. 69 of 7th Legal News), without a writ of summons to proceed summarily to remove a tutor for misconduct in his office. The same rule should apply here.

The Court would further refer counsel to the following authorities with reference to the relations of husband and wife to each other and the interference of the Court between them:—4 Demolombe, p. 129, No. 108; Sirey; Colmar, A.D. 1833. "La femme, qui, après le rejet d'une demande en séparation de corps, refuse de rendre au mari les enfants dont la surveillance lui avait été provisoirement confiée pendant l'instance, ne peut y être contrainte que par le refus d'aliments et la saisie de ses revenus;" A.D. 1834, 2, p. 127; J. P. 1857, 879; Sirey, 1862, 1, 128; J. P. 1865, 116; Sirey, 1867, 1, 212; 1868, 1, 208. The Court does not consider that the Colmar case marks the limits of the powers of the Superior Court, which was substituted for the Courts of Queen's Bench abolished by 12 Vic., c. 38, and also succeeded to the powers of the Courts of the Province and Superior Council prior to 1759. How a contumacious husband or wife could be coerced can only be discussed when the parties are properly before the Court.

Petition dismissed.

Honoré Mercier, Q.C., for petitioner.

E. Beauchamp for Mme. Delisle.

SUPERIOR COURT.

MONTREAL, March 5, 1884.

BAXTER V. MARTIN et al.

Procedure—Summons—C. C. P. 38.

Where an endorser (who was discharged in consequence of not receiving notice of protest), was made a defendant solely in order to withdraw the other defendant (the maker) from the Court of his own district, Art. 38 of the C. C. P. was held not to apply.

This was the merits of an exception declinatory by Martin, living in the District of Richelieu. He pleaded that his co-defendant Parent had no interest in the case and was only summoned in order to give the Court jurisdiction at Montreal.

The action was against Martin, maker, and Parent, endorser of a note. Parent did not receive notice of protest for non-payment, but it was alleged that he had waived protest.

The evidence was that Parent had not waived protest and therefore was not liable.

PER CURIAM. The action here has been taken against Parent solely in order to withdraw the defendant Martin from his natural judge, and the ordinary rule which would allow Martin to be sued out of his own district (C. C. P. 38 Can.) does not apply; Gilbert, *Procédure Civ. Art. 59, p. 65, No. 81, (Cod. Nap.)*

Exception maintained.

Greenshields, McCorkill & Guerin, for plaintiff.

Philippe Roy, for defendant Martin.

SUPERIOR COURT.

MONTREAL, March 3, 1884.

Before LORANGER, J.

RICHER V. THE CITY OF MONTREAL.

Municipal Code, Art. 583—Carter licensed by municipality of his domicile.

1. *A carter domiciled in a municipality outside of the City of Montreal, and duly licensed as a carter by such municipality, is entitled under Art. 583 of the Municipal Code to convey goods from said municipality into the City of Montreal without having a license from the city.*
2. *Where the Corporation for the purpose of making a test case, caused a carter to be arrested and detained several hours, instead of proceeding by summons, damages to the extent of \$50 were allowed.*

This was an action of damages brought by a carter against the City of Montreal under the following circumstances:—The plaintiff was a carter, resident in St. Cunegonde, and licensed for that municipality under the provisions of Article 583 of the Municipal Code, but not licensed for the City of Montreal. He was in the employ of the Montreal Rolling Mills Company, and on the 17th of November, 1882, was engaged in carting from the works of the company in St. Cunegonde to their establishment in the city, when he was stopped by Police Officer Waterson and asked to exhibit his license. The plaintiff produced

his license for St. Cunegonde. The policeman threatened to arrest him, and returned to the station and made his report. A warrant was issued, and the plaintiff was arrested and taken to the Seigneurs street station. The object of the Chief of Police, as was admitted by himself, was to make a test case, in order to obtain a decision upon the question whether carters who live in a municipality outside of the city limits, and who are licensed as carters for such municipality, are entitled to convey goods into the city without having also a license as carters from the City of Montreal. There is an article of the Municipal Code which recognizes this right. It is as follows:

"Art. 583. Every carter or common carrier licensed as such in the local municipality in which he is domiciled, may convey any articles taken from such municipality, or any persons going therefrom, into any other municipality erected in virtue of any law whatsoever, without paying to such other municipality any municipal license or taxes by reason of such conveyance. He may also, without being bound to take out any other license, or to pay any other tax, convey within the local municipality wherein he is licensed, goods or persons coming from any other municipality erected under any law whatsoever."

On the other hand, the Corporation of Montreal relied upon section 123, sub-section 61, of their charter, 37 Victoria, chapter 51, and by-law 133 founded thereon, which makes it obligatory upon carters to have a license from the city in order to carry goods in the city, and enacts a penalty for default to comply with the law. The case was tried before the Recorder, and Richer pleaded that the city by-law was *ultra vires*, and that his arrest was illegal, he having a right to carry goods in the city notwithstanding the by-law. The Recorder, however, maintained the validity of the arrest, and Richer was condemned to pay a fine or undergo a term of imprisonment. Richer then brought the case by *certiorari* before the Superior Court, where the conviction was quashed, the court maintaining the right of carters domiciled outside the city and licensed by their municipality, to cart goods into the city. Richer now brought an action of damages against the city, based

upon the illegal arrest. The corporation pleaded as they had done before, that the by-law was valid, and that the policeman was fulfilling his duty; in a word, they justified the arrest.

The Court, in rendering judgment, remarked that it was not disposed to sit in revision upon the judgment already rendered pronouncing the by-law to be invalid.

The judgment of the Court was as follows:

"La cour, etc....

"Attendu que le demandeur, charretier, résidant dans la municipalité de Ste. Cune-gonde et licencié comme tel dans la dite municipalité, allègue que le septième jour de novembre 1882, il aurait été arrêté et conduit au poste de police, à la poursuite de la défenderesse, pour infraction au règlement, qui défend à tout charretier résidant en dehors des limites de la cité, de transporter dans la cité des effets venant ainsi du dehors, sans avoir au préalable obtenu une licence de la défenderesse; que le dit demandeur aurait été renfermé pendant quelques heures dans une des cellules du poste, et n'en serait sorti que sur dépôt d'une somme de vingt dollars et après avoir pris telle licence; que plus tard, il aurait été traduit devant la cour du Recorder, et s'y serait défendu par procureur et aurait plaidé que la réglementation en question était nul et *ultra vires*, comme contravenant aux dispositions de l'art. 583 du Code Municipal, en vertu duquel il est permis à tout charretier licencié dans une municipalité où il est domicilié de transporter des effets qui proviennent de cette municipalité dans une autre municipalité locale érigée en vertu d'une loi quelconque; que nonobstant cette défense, le demandeur aurait été condamné à l'amende par le Recorder et à défaut de paiement, à l'emprisonnement; que le dit demandeur aurait fait casser la dite conviction par la Cour Supérieure qui aurait déclaré que le règlement susdit était nul et *ultra vires*; que le demandeur aurait par le fait de cette arrestation illégale, souffert des dommages considérables qu'il évalue par son action à la somme de \$;

"Attendu que la défenderesse, nonobstant le jugement de la Cour Supérieure, qui a déclaré comme susdit nul et non avenu le règlement en vertu duquel le demandeur a été

traduit devant la cour du Recorder, a plaidé à l'action du demandeur que le dit règlement était valable et l'arrestation du demandeur était justifiable; que le demandeur n'avait souffert aucun dommage réel, et qu'il n'y avait pas lieu à des dommages exemplaires contre la défenderesse;

"Considérant qu'il est en preuve qu'à l'époque où le demandeur fut arrêté par les ordres de la défenderesse et par ses employés dûment autorisés, le demandeur résidait dans la municipalité de Ste. Cune-gonde et était muni d'une licence de charretier; qu'il était à l'emploi comme tel de la société dite "The Rolling Mills Company," et transportait dans une voiture portant le nom de la dite société des effets manufacturés dans les ateliers situés à Ste. Cune-gonde, à la place d'affaires que possède la dite société en la cité de Montréal, ce qu'il avait le droit de faire aux termes de l'article 583 du Code Municipal ci-dessus cité;

"Considérant qu'il est en preuve que la défenderesse informée par ses employés du fait en question, et voulant provoquer un jugement de la cour sur la validité du règlement ci-dessus cité, a ordonné que le demandeur fut arrêté et traduit devant la cour du Recorder;

"Considérant que la défenderesse au lieu de procéder contre le demandeur par voie de sommation, ce qu'il lui était loisible de faire, a jugé à propos de le faire arrêter par la voie du warrant et conduire au poste de police où il fut enfermé pendant plusieurs heures;

"Considérant que l'arrestation du demandeur a eu lieu sans cause et sans droit, et que la défenderesse a dans ses procédures mis une sévérité et une rigueur que les circonstances ne justifiaient point; que le demandeur est en droit de réclamer d'elle le redressement du tout dommage qu'elle lui a causé;

"Considérant que sous les circonstances le demandeur a droit à des dommages au montant de \$50;

"La cour condamne la défenderesse à payer au demandeur la dite somme de \$50 et les dépens de l'action telle qu'intentée," etc.

Judgment for Plaintiff.

Church, Chapleau, Hall & Atwater for plaintiff.
R. Roy, Q.C., for defendant.

The Legal News.

VOL. VII. MARCH 15, 1884. No. 11.

THE LAW OF EVIDENCE.

The bill introduced by Mr. Cameron (Huron) to permit persons accused of certain offences to testify in their own favour, was defeated by a very narrow majority, on the motion of Mr. Bossé that the committee should rise. It should be a source of satisfaction to the Bar of this Province to know that one of its members had taken the initiative in stopping so foolish a measure. It is difficult to conceive on what grounds so large a number of members were induced to concur in so important a change in the law of evidence. The public has a right to know on what statistical information Mr. Cameron relies for suggesting this alteration. If he has none, then we may fairly conclude that he is seeking change for the sake of change, or of notoriety. Mr. Robertson (Hamilton) takes a higher flight, and dogmatizes on the discovery of truth. The preamble of his bill assumes that "the discovery of truth in courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses." We presume Mr. Robertson means by this to say, that the admission of the testimony of interested parties promotes the discovery of truth. The proposition does not carry with it an air of probability, and we think it would rather puzzle the learned legislator to find any authority to support his statement. From every direction, we hear the cry that perjury is on the increase, and this result coincides with the provisions of every nation in the world. If Mr. Robertson's observation be true, then all persons should be admitted to testify in Courts of Justice under the same sanctions they gossip with their neighbour, on the wide principle lately contended for by Mr. John Bright, that people should not be taught by the law to believe that there are two kinds of truth. With superficial observers like Mr. Robertson and philosophers like Mr. Bright, civilization is in as great peril as it ever was when assailed by the barbarians.

The dogmatic crudity of Mr. Robertson's preamble is introductory to the following provision: "If any person called to give evidence in any criminal proceeding, or in any civil proceeding, in respect of which the Parliament of Canada has jurisdiction in this behalf, objects to take an oath, or is objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following solemn promise and declaration." In other words, any person who is not credible under oath, shall be believed under affirmation. Perhaps Mr. Robertson may find occasion before the end of the Session, to add to our knowledge of ethical science, by explaining how an affirmation can bind a conscience, which is insensible to the obligation of an oath. R.

THE SEDUCTION BILL.

Mr. Charlton with a persistence worthy of a better object, has once more brought before the Legislature his bill "to provide for the punishment of seduction and like offences." The report of proceedings in the House of Commons a few days ago indicated that the bill had been modified so as to remove the clauses to which objection has been taken; but a later report showed that one of these clauses had been restored in Committee. The clause referred to is in these terms:

"1. Any man who shall under promise of marriage seduce any unmarried female of previously chaste character, and not more than 21 years of age, shall be guilty of a misdemeanour, and shall be punished as hereinafter provided."

This provision is suggested by an erroneous view of morality. When a woman barter her virtue for a promise of marriage she has already ceased to be a "chaste character." If she yields at the first temptation we may sympathize with her in her fall, and we may condemn the seducer, or, it may be, the participant in an offence of which the guilt is evenly balanced. But that the law in either case, or under any circumstances, should come to her aid, to enable her to extort the fulfilment of a corrupt contract, is a totally different matter. Even admitting that such

an enactment might in a few cases accomplish a rough sort of justice, shall the safeguards of female purity be removed and the descent into vice be rewarded and encouraged from mere sentimental considerations? Women under 21 are often more mature than those of the opposite sex, whom they allure, but who in this bill are treated as the only offenders. There is no limitation of age on the side of the female. A woman of 20 may figure as the prosecutor of a verdant youth of 17 or 18. There was a case of rape a few days ago before our Courts, in which the complainant was a girl of only 13. Yet it appeared on cross-examination that she was a consenting party to the connection; the prosecution was an afterthought; and the medical evidence indicated that she had lost her virginity at a period long antecedent to the date of the alleged crime. Such girls ripen fast in profligacy, and they would have ample time before the age of 21 to entrap a victim with the convenient aid of the Seduction Act. It might possibly be difficult to prove the previous unchastity, yet in reality they are as the women "whose lips drop as an honeycomb and whose mouth is smoother than oil."

No good practical result can come out of such a law. When its aid is invoked by *soi-disant* "chaste characters" the mischievous tendency of the provision will be more apparent to the public mind. We look, however, to the Senate to give the measure its quietus, if it gets so far. The Minister of Justice, it will be remembered, last year spoke vigorously against the bill, and quoted from letters which he had received from some of the most eminent judges in Canada, protesting against the legislation contemplated. The Senate will doubtless be slow to disregard the deliberate opinion of those who have had the greatest experience in administering the criminal law.

U. S. LEGAL JOURNALISM.

Like the lean kine in Pharaoh's dream, the *Southern Law Review*, which was only a bi-monthly, is eating up its contemporaries, which from their rank as monthlies may be likened to the fat kine. First, the *American Law Review* in the "Hub" of the far north

was gathered in, the devourer, however, taking the name of the devoured. Now the *Western Jurist*, of Iowa, is absorbed and completes a trinity. Our anthropophagous contemporary even hints at further engorgements. "Perhaps the *Montreal Legal News* would like to open negotiations with "us," is the insinuating style of our contemporary's address. We feel flattered, but we think not. We prefer the calm skies and sunny slopes of our native haunt, our regal mountain, to the cyclones, floods and tornadoes of the far West,—not to mention those little death-dealing instruments, which lie hidden in hip-pockets, ready to be used against guileless editors who have more candor than complaisance. Seriously, however, we heartily congratulate our contemporary upon his prosperous—we won't say "bloated"—appearance. There are three times as many good things as of old, and we may, as a far-away outsider—an Arctic bear or anything else you choose—say that the *American Law Review*, the *Albany Law Journal*, the *Criminal Law Magazine*, and one or two more, are a credit to the profession. There can be no doubt that the atmosphere of the law is all the clearer and purer for a good stamp of journalism. Editors sitting in their chairs may help to frighten away a great deal that is mean and sordid and pettifogging. And more than that, it is true to some extent that they hold, so to speak, the magic wand which vivifies the dry bones of the law, and imparts a savour to what would sometimes be as unpalatable, to borrow an old simile, as "sawdust without butter."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[Crown Side.]

MONTREAL, March 6, 1884.

.Before RAMSAY, J.

THE QUEEN V. ALEXANDER MAHER.

Neglecting to provide wife with necessaries—Evidence—32-33 Vict. (Can.), cap. 20, sect. 25.

1. *On trial of husband for neglecting to provide wife with necessaries, the evidence of the wife is admissible on behalf of the Crown.*

2. *The words in sect. 25 of 32-33 Vict., cap. 25, "so that the life of such apprentice or servant is endangered, or the health of such apprentice or servant has been, or is likely to be, permanently injured," must be read as applying to the "wife, child, ward, lunatic or idiot," mentioned in the first part of the section, notwithstanding that in the repetition of the enumeration "apprentices or servants" are alone mentioned.*

The prisoner was indicted for neglecting to provide for his wife the necessities of life.

Esther Desormeau, wife of the prisoner, was brought up as a witness on behalf of the Crown. On the part of the prisoner her evidence was objected to.

RAMSAY, J. I have to decide as I did the other day in the case of *Gauthier*, who was not defended, that the evidence of the wife is admissible, as it seems to me that the section of the Act under which the prisoner is indicted (32 & 33 Vic. c. 20, s. 25) must be considered as creating a constructive assault. It appears, however, that the Courts in Ontario have arrived at a different conclusion, and if the case results in a verdict of guilty I shall reserve the point.

The woman's evidence was then proceeded with.

The Crown case being closed, Mr. *Prefontaine*, the counsel for the prisoner, submitted that there was no case to go to the jury, inasmuch as there was no evidence of destitution of such a nature as to endanger or be likely to endanger the health of the complainant.

Davidson, Q.C., for the Crown, said that if the last portion of the section, "so that the life of such apprentice or servant is endangered, or the health of such apprentice or servant has been, or is likely to be, permanently injured," is to be considered as applying to the whole of the offences mentioned in section 25, the indictment, which is drawn according to the form usually employed in this Court, is insufficient. He directed the attention of the Court to the fact that the French version, by its punctuation, seemed to make these words applicable only to the offence against the apprentice or servant.

RAMSAY, J. The question now raised has not come under my notice for the first time,

and therefore I am prepared to express my opinion at once. It seems to me that section 25 sets forth varieties of a new offence which are all controlled by the words referred to by the learned counsel for the Crown. This is the natural construction of the sentence, for it is followed by words which are necessarily applicable to all that goes before, the quality of the offence and its punishment. The sense also indicates this, for if these words do not apply to the first part of the sentence as well as to the last, we should have the actual doing of bodily harm made innocent, unless there was the likelihood of its doing permanent injury, while the refusal or neglecting to provide the necessities of life alone would be an offence: that is to say, an act of omission would be more readily considered to be criminal than an act of commission. Of course I observe that in the repetition of the enumeration of the persons who may be the subjects of these offences, apprentices and servants are alone mentioned, but I think they are mentioned as representatives of the class fully enumerated before, and the Statute saying "*such* apprentice or servant," the others are to be understood.

I attach no importance to the difference of punctuation between the French and English versions, for two reasons—1st, This Statute is borrowed almost textually from an English Act; and 2ndly, the smaller divisions of punctuation are a very slender guide to interpretation.

In addition to this, I think that without these words in the Statute, it would be necessary to prove such a deprivation of the necessities of life as would amount to a constructive assault. It surely could not be intended to say that a man must be obliged to establish in a criminal court some lawful excuse each time he refuses to give his wife such food, clothing or lodging as she might choose to demand. In this case there is no evidence of destitution at all. It amounts to this, that the first witness was refused money by her husband at Longueuil, where he was engaged at work, and where she followed him. That she went back to her sisters, and there refused to eat either at dinner or supper, although food was offered to her—that since that time she has lived as

she had done all her life, that is, as a labouring woman. I shall direct the jury to acquit the prisoner on the ground that the indictment is insufficient.

It is very fortunate that the case has been brought up in its present form, for there was evidently no further evidence to support the indictment if otherwise framed, and it permits of the Court dealing with the matter of law which it is important to consider.

C. P. Davidson, Q.C., for the Crown.
Profontaine, for the prisoner.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before TORRANCE, DOHERTY & RAINVILLE, JJ.

BELLHOUSE V. LAVIOLETTE.

Master and servant—Responsibility of master for negligence of servant.

The rule which makes a master responsible for the negligence of his servant does not apply where the servant at the time is absent from service and is engaged about his own affairs.

The judgment brought under Review was rendered by the Superior Court, Montreal, Loranger, J., Sept. 13, 1883.

The action was to recover damages for injury done to the plaintiff's horse by the defendants' servant, in a collision of two sleighs, one driven for plaintiff by one Macgregor, the other driven by Alfred Cypiot, the servant of defendants. The defendants were condemned to pay \$110.

It was contended in review that the judgment was erroneous in so far as it held that the horse and sleigh which collided with that of plaintiff, belonged to defendants, and was at the time of the accident, driven by their servant while in their employ, the proof, they contended, being that such horse and sleigh were not their property, and were at the time being driven by Alfred Cypiot, who, it was true, was in their employ, but was at the time absent from their service, and was so driving said horse and sleigh in and about his personal business and affairs.

TORRANCE, J. I find that though Cypiot was in the employ of the Laviolettes, he was not doing their work or employed by them at the time of the accident, but was driving a horse and sleigh which he had borrowed

from Mrs. Thomas, the adjoining occupant, for his own affairs. This fact is proved without any doubt by Cypiot and by young Geo. Finch who gave him his mother's horse and sleigh. The ordinary rule cannot here apply which makes a master responsible for the negligence of his servant. We are all agreed that the action should be dismissed. The loss of the number on the horse which the policeman took possession of but lost, is to be regretted. It would have been a useful link to make clearer the evidence of proprietorship.

Judgment reversed.

Dunlop & Lyman, for plaintiff.

Doherty & Doherty, for defendants.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before TORRANCE, DOHERTY & RAINVILLE, JJ.

LES RELIGIEUSES DE L'HOTEL-DIEU V. NELSON et vir, and NELSON et al. v. HARRISON, and HARRISON v. NELSON et vir.

Usufruct—Debt of estate—C. C. 474.

A usufructuary by general title is bound to contribute with the proprietor, out of a sum of ready money received from the estate, to pay a debt of the estate which became due after the testator's death.

The judgment under Review was rendered by the Superior Court, Montreal, Papineau, J., May 31, 1883.

The principal plaintiffs were creditors of the Estate Colin Campbell for \$1,187. The principal defendants represented Campbell as *nus propriétaires* and Dame Sarah Harrison was usufructuary by universal title of one-half of the whole estate of Campbell. When Campbell died, he left in his estate a sum of ready money after payment of all debts then due (which was not the case with the present debt), and one-half of this ready money was paid over to the usufructuary Sarah Harrison. The present claim became due in 1880. Nelson et vir, being sued, sued in turn the usufructuary to have her condemned to pay out of the money received by her from the estate.

The latter contended, under C. C. 474, that an attempt was being made to compel her to advance her own moneys to pay the debts of

the estate. The Court below gave judgment in her favour.

Archibald, for Nelson et vir, argued that they had a right to compel her to bring forward a portion of the money in her hands belonging to the estate to pay her portion of the debt. He cited Proudhon, *Salviat*, Dalloz and Demolombe for the doctrine that both usufructuary and proprietor had the right to force the other to contribute to the payment of the debts out of the moneys in their hands of the estate; Proudhon, usufruit, Tome 4, No. 1898, 1902; *Salviat*, usufruit, p. 206, No. 3; 10 Demolombe, No. 541.

TORRANCE, J. I agree entirely with the elaborate argument of Mr.**Archibald* and would condemn the usufruct to contribute.

Judgment reversed.

Archibald & McCormick, for plff. en gar.
Doutre & Co., for deft. en gar.

SUPERIOR COURT.

MONTREAL, March 8, 1884.

Before TORRANCE, J.

STEPHEN et al. v. THE MONTREAL, PORTLAND & BOSTON RAILWAY COMPANY.

Company—Injunction to prevent annual meeting—Control of Shares.

The petitioners by agreement with B., a shareholder holding the majority of shares in a railroad company, obtained an option to acquire within two years certain proportions of B.'s interests, and in the meantime until such option was declared, B. was to hold his shares as trustee for the petitioners, but he reserved the right to vote on the shares. B., after obtaining large advances from petitioners, became insolvent and left Canada, and petitioners applied for an injunction to prevent the annual meeting on the ground that as they were precluded from voting by the reservation to B., the meeting of shareholders would be controlled by the minority, and they asked that the status quo be preserved until their option expired: Held, that the petitioners had not established a case justifying the interference of the Court, and the injunction was dissolved. Semble, that if the interests of shareholders or petitioners were jeopardized by the proceedings at the annual meeting, the Court pending suit might appoint a receiver or

sequestrator to hold the company in the interest of all concerned.

The petition of George Stephen, Richard B. Angus, Duncan McIntyre, and Donald A. Smith, set forth that on the 14th July, 1882, Bradley Barlow was owner of 7,924 shares of the capital stock of the said company out of a total of 10,199 shares. That said Barlow then made an agreement with petitioners whereby he granted to them the right and option to acquire within two years one-third or two-thirds, at choice of petitioners, of such shares and other property and all railway interests of said Barlow as existing on 1st January, 1882, at the price of \$1,250,000 for one-third, and at the same rate for two-thirds of said property. In order to secure said option to petitioners, Barlow bound himself not to transfer the said shares of said company during the period of said option, but Barlow should hold said shares as trustee for petitioners, Barlow reserving to himself the right to vote on all such shares till such transfer. That petitioners agreed to make advances upon notes of the South Eastern Railway Company in favour of Barlow, and guaranteed by him and bonds of this company to the amount par value of \$1,250,000, on account of which advances had already been made to the amount of \$150,000. That petitioners advanced to said Barlow under said agreement \$1,400,000. That said option will not expire before 14th July, 1884; that all said shares held by said Barlow are pledged to said petitioners for repayment of said advances. That said M. P. & B. Railway Company have called a general meeting to be held on 16th January, 1884, to elect seven directors, and for transaction of other business. That said shares held by Barlow constitute more than eight-tenths of the entire capital stock of said M. P. & B. Railway Company, and Barlow has no interest therein or in said railway, but petitioners are the actual parties in interest as regards said shares pledged to them as to said option and said advances; that Barlow is insolvent and an absconding debtor from this province, and creditors have attached all railway shares held by him and said shares so pledged to petitioners, and he has no interest in controlling said shares or directing the affairs

of said company, and it will be in the power of a small minority of shareholders in said company, with or without the connivance of said Barlow, to obtain control of said company and deprive petitioners of their security. That petitioners are entitled to claim that no change be made in the position, status and management of said company different from that existing on the 1st January, 1882, and they are powerless to control said meeting of shareholders, although the chief party in interest, being precluded from voting by the reservation to said Barlow. Wherefore petitioners prayed that an injunction issue against the company, its officers and shareholders, enjoining them to appear, and that it be adjudged that petitioners are the chief parties interested so far as relates to 7,924 shares in the capital stock of said company, and that said company be restrained from holding said meeting of 16th January, 1884, or taking any proceeding to change the status or management of said company or its property previous to the 14th July, 1884, and until said seizures of shares be determined in due course, &c.

Bradley Barlow intervened in the cause on the 30th January, 1884, and set out the above recited agreement of 18th July, 1882, and went on to allege that he was ready to carry out the sale of one-third or two-thirds of the said property, but petitioners had not yet declared their option, and had no right to interfere with the petitioner in intervention, or to prevent him from voting, etc.; that said shares still remained in his hands; that he never pledged the shares of defendant, and petitioners have now no right to said shares and the intervener was the legal owner; that he was represented by his attorney, Albert B. Cross, who would have been prepared to vote at the annual meeting of the 16th January, 1884, prevented by this injunction; that intervener was owner of 8,147 shares of the stock of defendant; that Samuel Willett, a director, is holder of seventy shares acquired by intervener from Willett in January, 1883, and the other directors only hold ten shares each; that this injunction was applied for solely with the view of retaining control by the present directors of defendant and in the interest of

petitioners and of the South Eastern Railroad, and for the purpose of defeating the rights of intervener and other creditors by preventing the annual meeting of the 16th January, 1884. Conclusions are accordingly.

John Cassie Hatton also intervened and presented a petition with similar conclusions as owner of 965 shares and 38 bonds.

PER CURIAM. The evidence shows that Barlow has over 7,000 shares, Hatton has 965 and 38 bonds. The petitioners have advanced \$1,400,000 under the agreement set forth. There is no proof of Barlow's shares being pledged in the ordinary sense. The petitioners have no privilege or lien upon them. Barlow promised to hold them as trustee for petitioners, but specifically reserved the right of voting on them. He is insolvent and there are attachments out against him. The prayer of the petitioners is that the *status quo* be preserved till 14th July next. Should the Court grant this? See Kerr on Injunctions, edition of 1867, p. 541, cap. 23; *Featherstone v. Cooke*, 16 L. R., Equity Cases, p. 301, remarks of Malins, V. C. This case suggests what should be done here. If the meeting took place for the election of office-bearers, and they were elected, and mischief was apprehended, the court or judge pending suit might appoint a sequestrator who would hold for all. If Barlow were insolvent, petitioners would rank like ordinary creditors. The shares do not appear to be theirs, but the creditors' generally.

My conclusion is that it is not reasonable to tie the hands of all interested for six months to come from the mere apprehension that if the usual meeting took place something may be done disadvantageous to petitioners, who appear to be only ordinary creditors. The hands of one set of shareholders would be tied up for the advantage of another section. If there are contending interests, they will be preserved during the litigation by the appointment of a receiver or sequestrator, which will be fairer than the course now sought to be adopted. The petition will be dismissed, the interventions maintained, and the injunction dissolved.

O'Halloran, Q.C., for petitioners.

J. L. Morris, for intervener.

Geoffrion, counsel.

THE LEGAL NEWS.

THE LATE SIR JOHN BYLES.

The celebrated author of "Byles on Bills," formerly a judge of the Court of Common Pleas, died on the 3rd of February. The *Law Journal* (London) says:—

"The career of Sir John Byles was that of a most successful advocate at the bar, and a very learned lawyer as barrister and judge in one branch of legal study. 'Byles on Bills' for accuracy and clearness is among the best law books in the English language. Lawyers and judges have for years turned to it for information with absolute confidence. It is not too much to say that without it the codification of the law of bills of exchange would have been impossible. Sir John Byles took an interest in this book up to a very few weeks before his death. A question whether its copyright had not been infringed was referred to him to decide whether any and what proceedings should be taken. We believe the matter was amicably arranged, but the incident is curious as showing that one of his last acts was in vindication of the book which in the future will be his chief title to fame. Sir John was thirty years of age before he was called to the bar, and up to that he had been in business. His business experiences, perhaps, suggested to him the production of a book on one of the most important branches of commercial law. The success of the book still further determined the bent of his legal studies and practice. He became a good commercial lawyer, but he never gained any great reputation in other branches of the law. His mind wanted that breadth and clearheadedness which are essential to the intellectual equipment of a great lawyer, who is to lay down propositions of universal application. He will never take the place filled by James, Willes or Jessel, but will always be known as Byles on Bills, a result to which the 'artful aid' of alliteration conduces. Many are the stories told of Sir John Byles when at the bar and on the bench. His horse figures in several of them. When he was at the bar he had a horse, or rather a pony, which used to arrive at King's Bench Walk every afternoon at three o'clock. Whatever his engagements, Mr. Byles would manage by hook or by crook to take a ride,

generally to the Regent's Park and back, on this animal, the sorry appearance of which was the amusement of the Temple. This horse, it is said, was sometimes called 'Bill' to give opportunity for the combination 'there goes Byles on Bills;' but if tradition is to be believed, this was not the name by which its master knew it. He, or he and his clerk between them, called the horse 'Business;' and when a too curious client asked where the Serjeant was, the clerk answered with a clear conscience that he was 'out on Business.' When on the bench, Mr. Justice Byles' taste in horseflesh does not seem to have improved. It is related of him that in an argument upon section 17 of the Statute of Frauds he put to the counsel arguing a case, by way of illustration. 'Suppose Mr. So and So' he said, 'that I were to agree to sell you my horse, do you mean to say that I could not recover the price unless,' and so on. The illustration was so pointed that there was no way out of it but to say, 'My lord, the section applies only to things of the value of 10*l.*,' a retort which all who had ever seen the horse thoroughly appreciated. Instances of his astuteness in advocacy were numerous. His mode of winning cases was not by carrying juries with him by a storm of eloquence, or cross-examining witnesses out of court, but by discovering the weak point in his adversary's case and tripping him up, or by the nice conduct of such resources as his own case possessed. On one occasion he was retained for the defendant with Mr., afterward Mr. Justice, Willes, whom he led at the bar, but who was afterward his senior in the Court of Common Pleas, in a case of some complication tried before Chief Justice Jervis. At the end of the day (Saturday), Mr. Byles submitted that there was no case, and the judge rose to give his decision next week. In the interval Willes asked Byles why he did not take a particular point which both had agreed in consultation to be fatal to the plaintiff's case. 'I left that to the chief justice,' said Byles; 'I led up to it, and walked round it, so that he cannot miss it, but if I had taken it he would have decided against us at once.' And so it proved, for on Monday morning the chief justice gave an elaborate judgment overruling all the points

taken, but nonsuited the plaintiff on a ground which he said he was astonished to find had not been taken by either of the very learned counsel for the defendant, but which in his opinion was conclusive. In another case Byles was for the plaintiff, and Edwin James for the defendant, in an action on a bond tried before Chief Justice Tindal. Byles was a long time in opening his case and examining his witnesses, until the chief justice became restless. Still more restless was Edwin James, who wanted to go elsewhere. Byles, seeing his impatience, whispered to him, 'give me judgment for the principal, and I will let you off the interest.' Accordingly a verdict was taken for the plaintiff for the amount of the bond without interest. Afterward Edwin James asked Byles why he had foregone the interest? 'You need only have put in the bond,' said he, 'and you would have had both.' 'That was just the difficulty,' said Byles, 'the bond was not in court.' In those days adjournments were not so easily granted as now, and in any case the costs of the day would have exceeded the interest. A reputation for successes like these made Byles a formidable adversary. On one occasion at Norwich he had for an opponent a counsel whose strong point was advocacy rather than law. Byles, who was for the defendant, went into the court before the Judge sat, and in the presence of his opponent he called to his clerk, 'What time does the midday train leave for London?' 'Half-past twelve, sir.' 'Then mind you have everything ready; and meet me in good time at my lodgings.' 'But, Serjeant,' said the plaintiff's counsel, 'this is a long case; it will last at least all day.' 'A long case!' said Byles; 'it will not last long; you are going to be non-suited.' The advocate, who stood much in awe of his opponent's legal skill and knowledge, spoke to his client. The result was that the case was settled for a moderate sum, and Mr. Byles caught his train.

Mr. Justice Byles was a strong Tory, and had a horror of Judicature Acts, the fusion of law and equity, and other modern innovations which were floating in the air in 1873. He declared that he would not remain an hour longer on the bench than his fifteen

years. On the first day of Hilary Term, 1858, he took his seat on the bench of the Court of Common Pleas, and on the first day of Hilary, 1873, his resignation arrived. The moment was inconvenient for the appointment of a new judge, but the judge could not resign before, and he would not wait a moment. Of his career on the bench it is enough to say that he was acute, courteous, and upright, as he was kindly in private life. His name is not connected with many great decisions, but he took part in the case of *Chorlton v. Lings*, in which it was decided that women did not obtain Parliamentary votes by the representation of the people act, 1867, in virtue of the new franchise conferred on 'every man.' His judgment is an example of his rather quaint and old-fashioned judicial style. 'No doubt,' he says, 'the word man in a scientific treatise on zoology or fossil organic remains would include men, women and children as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But in almost every other connection the word man is used in contradistinction to women. * * * Women for centuries have always been considered legally incapable of voting for members of Parliament, as much so as of being themselves elected to serve as members. In addition to all which, we have the unanimous decision of the Scotch judges. And I trust their unanimous decision and our unanimous decision will forever exorcise and lay this ghost of a doubt, which ought never to have made its appearance.' The following anecdote is also floating around:—A learned counsel on one occasion was pleading a cause before Sir John Byles, and made a quotation from a work, 'which,' said he, 'I hold in my hand, and is commonly called 'Byles on Bills.' Sir John Byles: Does the learned author give any authority for that statement? Counsel, referring to the work: No, my lord, I cannot find that he does. Sir John Byles: Ah! then do not trust him; I know him well.'

The Legal News.

VOL. VII. MARCH 22, 1884. No. 12.

JUDGES AND RAILWAY PASSES.

The *American Law Review* is disposed to take exception to our passing reference to the application of Lord Coleridge's entertainers for railway passes in Canada, and appears to find a justification in the fact that the passes were solicited by Mr. Vanderbilt's son-in-law. "He was asking for something which is regarded as a thing of decent custom in the United States." We are ready to make due allowance for that, though many might be inclined to say that asking for something without a *quid pro quo* is rather a thing of 'indecent' custom,—a custom more honour'd in the breach than the observance"—more especially by persons of elevated rank or distinguished position. It is the asking or solicitation that we object to. We are perfectly willing to admit that it would have been a graceful compliment on the part of Canadian railway managers to have tendered to his lordship and his hosts the free use of their lines, just as they are now tendering the free use of their roads to the entire British Association which is to visit us this summer. But this is by the way. On the main point our contemporary goes quite as far as we do. "It is difficult to see how any judge, with a proper sense of what becomes his office, and with a proper feeling of self-respect, can sit in judgment between a railway company and a private person with an annual pass of the railway company in his pocket." A pass is, in fact, often a much greater interest in dollars and cents than the interest which a judge has in a suit against a corporation in which he happens to own a few shares; and yet in the latter case he is absolutely disqualified.

A PARALLEL CASE.

The same journal, in another article, affords us that wretched sort of consolation which is to be extracted from the knowledge th t

the condition of others is as bad or, indeed, worse than our own. Quoting our remarks anent the Montreal Court House, the *Law Review* says:—"If Montreal is tired of her Court-house, she can have ours. We have one in St. Louis that we would willingly swap for almost any other that we know of. Its stone floors reek with filth like a hog-pen. Multitudes of filthy tramps sleep in its corridors and under its porticos from early spring till late autumn. We have counted as many as thirty at one time around and behind the pillars facing on Fourth Street. The police commissioners claim that they have no jurisdiction to abate it. Overworked judges going from their chambers at night, stumble over these drunken tramps snoring in the hall-ways. The police of the Court-house building in St. Louis is in the hands of the City Government. Its condition as regards cleanliness would be a standing municipal disgrace, if anything could disgrace as filthy a city as St. Louis. The Court-house watch should have the aid of a fireman's hose, for the double work of clearing out the tramps and washing out the filth." All this is a wretched solace for our own discomfort, though, by the way, we are filled with surprise to learn that such is the condition of things in that favoured land to which all good Canadians betake themselves, and where they prosper. As we anticipated, there has not been a particle of improvement at Montreal, notwithstanding the remarks of Chief Justice Dorion and Mr. Justice Johnson. We cannot imagine what *would* make an impression. We have a sheriff and a deputy-sheriff, and a special deputy-sheriff, and an army of subordinates and care-takers feeding at the public crib. Possibly if some of these gentlemen were sent to gaol for a time there might be a faint ripple on the slough of indifference and apathy.

PUBLIC LIBRARIES.

Notwithstanding the Fraser bequest, Toronto after all has inaugurated her public library in advance of us. On the 6th of March, the fiftieth anniversary of her incorporation as a city, the public free library in Toronto was thrown open. The statistics of growth in the half century are certainly

gratifying. In 1834 the assessment of the new city was only \$934,000; in 1884 the assessment of Toronto is \$65,222,950. In 1834 the population was 9,200; in 1884 it is 95,000. In 1882 the "Libraries Act of Ontario" was passed. This Act empowers municipalities to raise funds for library purposes to the extent of one-half mill on the dollar on the assessable property. In 1883 the Council put the question to the people, and it was decided by a majority of 2,543 out of about 8,000 votes cast to establish a public library. With such a majority to back them the Council at once voted \$50,000 towards the scheme, and purchased the Mechanics' Institute at a cost of \$21,000. A library board was appointed, consisting of the Mayor, three representatives from the Council, three from the Public School Board, and two from the Separate School Board. Mr. Hallam was chosen chairman, and submitted a scheme as a basis for the establishment of the library, and his proposal, after being considerably modified before it met with the approval of the board, was finally adopted.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[In Chambers.]

MONTREAL, March 17, 1884.

Before DORION, C. J.

DORION, appellant, and DORION, respondent.
Factum—Taxation of Costs.

The rate of two dollars per page allowed by usage for cost of printing factums in appeal will not be reduced though it be shown that the actual disbursement was less than that sum.

A motion was made for the reduction of the item for printing factum, viz., \$2 per page. An affidavit was produced that the amount actually disbursed therefor was only \$1 per page.

DORION, C. J., held, in accordance with previous rulings, that the amount allowed for this service, viz., \$2 per page, could not be reduced, though a less sum had been paid.

Motion rejected.

P. A. A. Dorion, for motion.
Pagnuelo, Q. C., contra.

COURT OF QUEEN'S BENCH.

QUEBEC, Feb. 8, 1884.

MONK, RAMSAY, TESSIER, CROSS & BABY, JJ.

GAILLOUX et al. (*mis en cause* in the Court below,) Appellants, and BUREAU (petitioner in Court below) Respondent.

Deterioration of property seized—C.C.P. 646—Abandonment.

The defendant, in making an abandonment, reserved buildings constructed by him on the property after the plaintiff got his mortgage. Held, that the reservation had no effect, and that the removal by defendant of the buildings while the property was under seizure was a deterioration within C.C.P. 646.

The appeal was from a judgment of the Court of Review, Quebec, 30 April, 1883, reversing a judgment in Chambers of Bourgeois, J., at Three Rivers, 8 February, 1883.

The judgment in chambers was as follows:—

"Nous, soussigné, etc.,

"Considérant que l'immeuble saisi en cette cause et décrit à la dite requête du dit demandeur, a été délaissé en cette cause par le dit défendeur, sous la réserve des bâtisses érigées par le dit défendeur sur le dit immeuble, et que le dit demandeur a accepté le dit délaissement, et a fait nommer un curateur au dit délaissement;

"Considérant que le dit immeuble a été saisi sur le dit curateur, et que le shérif ne pouvait pas vendre sur le dit curateur, plus qu'il a été délaissé par le dit défendeur;

"Considérant que le tiers non tenu personnellement qui délaisse a le droit de réclamer ses impenses et améliorations utiles et nécessaires faites par lui sur l'immeuble délaissé, et que ce droit peut s'exercer par l'enlèvement de telles impenses et améliorations, si cet enlèvement peut se faire sans dégrader l'héritage;

"Considérant que les bâtisses que le dit défendeur a enlevées étaient des impenses par lui faites sur le dit immeuble, et qu'il s'était réservées par son acte de délaissement;

"Considérant que le dit immeuble est borné d'un côté à un immeuble appartenant

au dit défendeur; que le demandeur, dans sa dite requête, ne fait pas voir quelle clôture le dit défendeur a enlevée, ni que la clôture enlevée par le dit défendeur ne faisait pas partie de l'immeuble du dit défendeur bornant celui qui a été saisi et vendu en cette cause;

"Renvoyons la dite requête du dit demandeur contre les dits mis en cause, avec dépens," etc.

The following was the judgment in Review (Stuart, Casault and Caron, JJ.):—

"La Cour, etc.

"Considérant que le requérant allègue dans sa requête que le défendeur et les mis en cause ont, le jour de la vente judiciaire en cette cause de l'immeuble décrit dans la dite requête et saisi en cette cause, entre trois et huit heures de l'avant-midi, démoli et enlevé l'écurie et les latrines construites, et partie des clôtures érigées sur le dit immeuble, et les ont transportées sur l'emplacement voisin, en la possession du défendeur; que ces dégradations ayant eu l'effet de le priver du paiement de sa créance hypothécaire sur cet immeuble, il demande en conséquence que le dit défendeur et les mis en cause soient emprisonnés suivant la loi;

"Considérant que les mis en cause, par leur réponse à cette enquête, disent qu'ils ont travaillé à l'enlèvement de ces bâtisses de bonne foi et comme les ouvriers du défendeur, lequel plaide qu'en délaissant en justice le dit immeuble, il en a excepté les bâtisses;

"Considérant que le dit immeuble a été délaissé dans l'état où il était alors, et que l'hypothèque du demandeur et requérant s'étendait à toutes les améliorations subséquentes;

"Considérant que le défendeur après son dit délaissement, n'avait pas d'autre recours pour se faire rembourser de ses impenses et améliorations que de faire opposition sur les deniers provenant de la vente de cet immeuble;

"Considérant que le tribunal de première instance, le 16 mars 1882, en déclarant cet immeuble hypothéqué au paiement de la somme mentionnée en la déclaration du demandeur et requérant, et en ordonnant la vente en justice, réserva au défendeur son

recours pour le remboursement de ses dites impenses et améliorations sur les deniers à provenir de la vente ordonnée de cet immeuble, et qu'il n'y a pas eu d'appel de ce jugement;

"Considérant que le requérant a prouvé les allégations essentielles de sa requête, et que le défendeur et les mis en cause ne pouvaient faire aucune dégradation quelconque sur le dit immeuble saisi, à peine d'emprisonnement pour un terme n'excédant pas six mois;

"Considérant que les moyens invoqués par le défendeur et les mis en cause ne sont pas fondés;

"La Cour casse et annule le jugement rendu le 8 février 1883, et procédant à rendre le jugement que le dit tribunal inférieur siégeant à Trois-Rivières aurait dû rendre; déclare le défendeur, J. Bte. Gailloux, et les dits mis en cause, Feron, Vaillancour et Cloutier, coupables d'avoir dégradé et détérioré le dit immeuble alors sous saisie, au détriment du requérant et demandeur, et le dit défendeur Gailloux et les dits mis en cause Feron, Vaillancour et Cloutier, sont en conséquence condamnés à être emprisonnés dans la prison commune du dit district de Trois-Rivières, pendant l'espace d'un mois, et le dit défendeur et les mis en cause sont condamnés conjointement et solidairement à payer les dépens, etc., (*dissentiente* l'hon. juge Casault)."

RAMSAY, J. (for the majority of the Court):— This is a rule or a petition for a *contrainte par corps* against the appellants for deterioration of property under seizure, (646 C.C.P.). The appellants contend that they are not liable, that the deterioration which is not denied, was not of property under seizure. It is therefore contended, that he might be taken by *capias* to answer the damages if the deterioration amounted to the extent of \$40, but that he is not *contrainable par corps*. The system of the appellants is not wanting in ingenuity. The appellant Gailloux was sued hypothecarily and he made a *délaissement* of the property in the following form:

"Le défendeur déclare qu'il délaissé la propriété pour laquelle il est poursuivi hypothécairement en cette cause, moins les bâtisses

dessus construites, les dites bâtisses ayant été par lui construites postérieurement à l'hypothèque consentie au demandeur par les dits Antoine Menançon et Napoléon Menançon, moins aussi un passage à être pris, du côté nord-est du dit terrain, de huit pieds de front, mesure française, sur la profondeur du dit terrain, le droit à un tel passage ayant été acquis au défendeur par bons titres antérieurement à l'hypothèque du demandeur en cette cause.

"Trois-Rivières, 11 juin 1880.

J. BTE. GAILLOUX,
Défendeur.
(Contre-signé), DUMONT & DUMONT,
Procrs. du défndr."

A curator was named to the *délaissement* on whom the property was seized and sold, the plaintiff being *adjudicataire*. The morning of the sale, at a very early hour, the appellants demolished the out-buildings and fences, and carried them off. Appellants argue that the seizure could only be for what the curator had got by the *délaissement*, that he only held the land and not the buildings, and consequently that in destroying the buildings he was not deteriorating the land.

I presume there is much force in this argument. It succeeded in the Court of first instance, it divided the Court of Review, but the majority of this Court is of opinion that the decision in Review is correct. With all deference to the opinions of the learned judges who dissent, we cannot adopt the view that a reservation in a *délaissement*, which is absolutely null, should produce so remarkable an effect as to detach the buildings and fences from the land, so that the land should be seized and the buildings and fences not. It is said that the sheriff sold the land without buildings, and therefore, it is to be presumed, that at all events the appellants were not within the mischief of the article, and that therefore they should not be subjected to the penalty. The omission to mention buildings in the Sheriff's advertisements does not alter what is sold. It is a description of a quality of the property, and not of the property itself.

In addition to this, it may be said, that the fences were taken, and there was no attempt to reserve them in the *délaissement*. The appellant's excuse is therefore insufficient.

It will be well for people to make up their minds to this, that legal quibbling is a very expensive mode of extricating themselves from difficulties, and that the most expensive form of quibbling is that by which it is sought to cover up attempts to obtain justice by violence. The judgment of the Court of Review is therefore confirmed with costs.

Our attention has been attracted to an error of narrative of the proceedings in the judgment in Review. It is said that the judgment appealed from was "rendu par la Cour Supérieure siégeant dans le district des Trois-Rivières," instead of "par un juge de la Cour Supérieure siégeant en chambre dans le district des Trois-Rivières," etc. This correction will be made in the draft of the judgment to be rendered by this Court.

TESSIER and BABY, JJ., dissented.

Judgment of C. R. confirmed.

E. Gérin, for appellants.

Dumont & Dumont, for respondent.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before TORRANCE, RAINVILLE & MATHIEU, JJ.

DUPUIS v. BOUVIER.

Petitory action against tenant — Pleading —
C. C. 1618.

1. *The tenant sued in a petitory action is not entitled to ask for the dismissal of the action, but only that he be dismissed from the cause when the lessor declared by him has been brought in.*
2. *The indication by the tenant of the name of his lessor should be by preliminary plea, and not by a peremptory exception.*

The case was inscribed by the defendant, in review of a judgment of the Superior Court, Iberville, Chagnon, J., May 30, 1883.

RAINVILLE, J. L'action est pétitoire. Le demandeur allègue qu'il a acquis la propriété revendiqué de Wm. Vanvliet par acte du 16 avril 1881; que le dit Vanvliet lui a livré la possession et qu'il l'a gardée jusqu'au 28 mai 1882, jour où le défendeur par force et illégalement, se serait emparé de cette propriété.

Par son acte d'acquisition Vanvliet a déclaré que cette propriété lui appartenait pour l'avoir acquise de T. Arpin par acte du 30 décembre 1872, dument enregistré.

A cette action le défendeur a plaidé :

1o. Par une défense en droit ;

2o. Par une exception péremptoire.

La défense en droit invoque trois raisons :

1o. Parcequ'il n'appert pas par la déclaration que le nommé Vanvliet fut au temps de la dite vente propriétaire de la terre revendiquée : 2o. Parcequ'il n'appert pas par la déclaration que le demandeur est propriétaire de la dite terre ; et 3o. (la raison banale) Parceque les allégations de la déclaration ne justifient pas les conclusions prises en icelle.

Par son exception péremptoire le défendeur allègue qu'il est faux qu'il se soit emparé forcément, par malice et de mauvaise foi de la propriété en question ; qu'il occupe la dite propriété depuis le 28 mars 1882, mais à titre de fermier seulement, et non comme propriétaire, en vertu d'un bail que lui aurait consenti un nommé Frédéric Lefebvre, de Williamstown, dans l'Etat de Massachusetts, (Bail : Barrette, N.P.) lequel dit Lefebvre se prétendait propriétaire et possesseur de la dite propriété depuis plus de sept ans.

Que le demandeur connaissait, avant d'instituer son action que le défendeur n'occupait la propriété en question qu'à titre de fermier du dit F. Lefebvre.

Que le demandeur par action portée devant la cour de Circuit avait poursuivi le 3 avril 1882, un nommé Edouard Lefebvre qu'il prétendait être son locataire, et en même temps le présent défendeur pour les faire condamner à déguerpir. Cette action a été intentée sous l'acte des *locaturs et locataires*.

Qu'à cette action le défendeur Bouvier plaïda, invoquant son bail de F. Lefebvre, et que jugement intervint maintenant son exception et renvoyant l'action quant à lui.

Qu'il résulte de cela que le demandeur connaissait que le défendeur n'occupait qu'à titre de fermier, et que la présente action n'aurait pas dû être dirigée contre lui. Et il conclut au renvoi de l'action avec dépens.

A cette exception le demandeur a produit une réponse en droit basée sur le principe que le défendeur invoquant sa détention précaire ne peut pas conclure au renvoi de l'action, mais seulement sa mise hors de cause.

Le demandeur a produit aussi une réponse spéciale alléguant certains faits. Sur réplique en droit ces allégations ont été retranchées sur le principe que c'était une allégation de faits nouveaux. (Je crois que ce n'était qu'une inutile répétition de faits allégués

dans la déclaration). Dans tous les cas nous n'avons pas à nous en occuper.

Par sa réponse spéciale le demandeur a allégué que le défendeur possédait comme propriétaire : que son bail était simulé et fait pour couvrir sa possession frauduleuse.

Par un jugement interlocutoire la défense en droit du défendeur a été renvoyée, et sur la réponse en droit du demandeur à l'exception du défendeur, preuve avant faire droit a été ordonnée.

Par le jugement final l'action a été renvoyée pour les raisons suivantes :

1o. Parcequ'il est prouvé que le défendeur ne possédait qu'à titre de fermier et que son bail n'était pas simulé.

2o. Parceque le demandeur connaissait par suite des faits qui lui avaient été dénoncés dans l'action en expulsion, que le défendeur ne possédait qu'à titre précaire.

3o. Parcequ'en loi un locataire ne peut pas répondre à telle action, et que de fait le dit défendeur "en produisant son titre de bail sans attaquer le fond de la demande pétitoire et en concluant au renvoi de l'action, attendu la connaissance qu'avait le demandeur de tel titre, n'a pas excipé du droit d'autrui."

Le demandeur soumet ce jugement à la révision de cette cour, et il admet qu'il a failli de prouver sa réponse spéciale à l'exception du défendeur, savoir qu'il fût un détenteur *animo domini*, et il a admis à l'argument que le défendeur n'était qu'un détenteur précaire. Mais il prétend que la cour n'aurait pas dû renvoyer son action : que le jugement aurait dû lui donner l'occasion et le temps de mettre en cause le locateur F. Lefebvre, indiqué par le défendeur.

Pour décider ce point il s'agit d'interpréter l'art. 1618 de notre Code Civil. "Le locataire, dit cet article, sur toute action portée contre lui concernant la propriété à lui louée, peut demander congé de la demande en faisant connaître au poursuivant le nom de son locateur."

Mais quand et comment peut-il demander sa mise hors de cause ? Et d'abord quand peut-il faire cette demande ?

Pothier qui a traité cette question dans deux de ses différents ouvrages, semble énoncer une opinion différente dans chacun.

Dans son traité sur le "domaine de propriété" il s'exprime dans ces termes :—

"Le propriétaire qui a perdu la possession d'une chose, doit donner l'action en revendication contre celui qu'il trouve en possession de cette chose."

"Mais lorsque le détenteur indique le nom et la demeure de celui dont il tient (à ferme, etc.) le demandeur doit assigner la personne indiquée. Et après que celui de qui le fermier tient l'héritage a été mis en cause, et qu'il a pris le fait et cause de son fermier, ce dernier doit être mis hors de cause."

Bugnet, en sa note sur ce passage, dit :

"L'Art. 1727 du Code Civil contient l'application du même principe."

9 Pothier, No. 298, Ed. B. p. 205.

Mais dans son traité du louage il semble exprimer une opinion contraire et indiquer une procédure un peu différente. Si le fermier ou locataire, dit-il, est assigné par un tiers sur quelqu'une de ces actions (revendication, etc.), il n'est pas obligé de défendre : il n'a pas même qualité pour le faire : il n'est obligé qu'à indiquer au demandeur la personne de qui il tient l'héritage, et sur cette indication, il doit être renvoyé de la demande et le demandeur renvoyé à se pourvoir contre cette personne.

4 Poth. Louage, No. 91, Ed. B. p. 38.

Tous les auteurs sont d'opinion que le locataire n'est pas obligé d'appeler en cause son locateur : c'est au demandeur à agir, sur l'indication qui lui est faite.

Merlin Rep. Vo. Garantie, § 1.

Rapon Arrêts, Liv. 11, T. 4, No. 18, p. 658.

Charondas, Liv. 3, ch. 1, p. 192.

1 Jousse, Ord. de 1667, Tit. 8, Art. 1, p. 74.

La même doctrine prévaut sous le C. Nap. Art. 1727. Le locataire peut demander 1^e. Sa mise hors de cause, ou 2^e. rester en cause et appeler en garantie son propriétaire.

2 Tropl. Louage, Art. 1727, No. 266 à 269.

Et Aubry & Rau énoncent l'opinion que "le locataire peut être mis hors de cause s'il l'exige, encore que son locateur refuse de prendre son fait et cause."

4 Aubry & Rau, S. 366, note 28, p. 480. S. V. 37, 1, 134.

On voit par là que la question de la mise hors de cause n'a été résolue qu'après que le locateur eut été appelé. Mais le locateur avait été appelé et quoiqu'il ne voulut pas prendre le fait et cause de son locataire le demandeur pouvait se faire déclarer propriétaire contradictoirement avec lui, puisqu'il ne contestait pas sa qualité de bailleur et conséquemment de possesseur *animo domini* : et alors la mise hors de cause du locataire était juste et équitable et ne pouvait entraîner aucune conséquence fâcheuse pour le demandeur.

Mais, supposez que sur la simple dénonciation du locataire et même sur preuve, la cour mette ce locataire hors de cause et déboute le demandeur de son action, ce dernier n'aura plus d'autre remède qu'une action contre le locateur. C'est alors que surgit la difficulté : Ce locateur va plaider qu'il n'est pas locateur, ni possesseur, que la preuve faite par son prétendu locataire est fautive et que le jugement dans tous les cas n'est pas chose jugée à son égard. Alors que devra faire le demandeur ? Appeler le locataire en garantie ? Evidemment. Mais alors quel circuit d'actions ! Ne vaut-il pas mieux suivre l'opinion de Pothier telle que formulée dans son traité du domaine de propriété, et dire que le défendeur locataire ne peut obtenir sa mise hors de cause que lorsque le demandeur a appelé en cause le locateur indiqué. Si le locateur nie être locateur, alors sur simple dénonciation de cette défense au locataire il sera obligé d'y répondre. Et ce n'est qu'après qu'il l'aura fait rejeter qu'il pourra demander sa mise hors de cause ; car ce n'est qu'alors que le demandeur sera en position de faire juger sa demande contre le véritable possesseur.

Et si sur cette indication du locataire le demandeur n'agissait pas pour mettre en cause la personne indiquée, ce locataire pourrait faire fixer un délai pendant lequel le demandeur devra faire cet appel.

Dans la présente instance le demandeur a contesté la déclaration du défendeur qu'il n'était qu'un locataire : il a failli sur ce point, et l'indication du défendeur du nom de son locateur est présumée vraie et oblige le demandeur à appeler en cause ce locateur indiqué.

Le demandeur avait évidemment le droit de faire cette contestation, et parcequ'il a failli dans sa preuve il ne peut pas être placé dans une plus mauvaise position que s'il eut accepté cette déclaration du locataire comme vraie. Le jugement la déclare vraie et voilà tout. Mais le défendeur n'a pas demandé sa mise hors de cause : il a produit une exception péremptoire par laquelle il demande le débouté de l'action : il a en conséquence plaidé au fond.

Le demandeur a répondu en droit à cette exception : la cour de première instance a renvoyé cette réponse en droit et maintenu l'exception sur le droit, et sur le fait principalement sur la raison que le demandeur connaissait le titre en vertu duquel le défendeur possédait, en autant qu'il le lui avait dénoncé dans une action précédente.

Je crois ce jugement erroné en loi. Cette dénonciation ou indication du nom du locateur par le défendeur locataire ne doit pas se faire par une exception au fond : elle ne peut affecter en rien le fond du litige. Elle doit se faire par une exception *préliminaire*. C'est ce que M. le Juge en Chef Meredith a décidé en 1876 dans la cause de Lawlor et Cauchon, 6 Q. L. R., p. 13.

JUGES 10. Que le locataire peut obtenir sa mise hors de cause, mais qu'il ne peut demander le renvoi pur et simple de l'action du demandeur.

20. Qu'il doit faire la dénonciation du nom de son locateur *in limine litis*, par un plaidoyer *préliminaire* et non par une *exception péremptoire*.

Ce jugement a été rendu sur une réponse en droit que la cour a maintenue, à une *exception péremptoire*.

Voir 26 L. C. J. 213, C. de R.

Mais dans la cause actuelle, il y a plus encore, c'est qu'avant d'avoir fait sa dénonciation du nom de son locateur dans son *exception péremptoire*, le défendeur avait plaidé au fond par une défense en droit.

The judgment of the Court granted *acte* to the defendant of his declaration that he is a tenant, and the plaintiff's answer-in-law to the defendant's exception was maintained; costs in Review against defendant, each party to pay his own costs in the Court below; one month's delay to the plaintiff to put the lessor in the cause.

Judgment reformed.

Geoffrion & Co., for plaintiff.

J. S. Messier & Beique & Co., for deft.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before TORRANCE, DOHERTY & RAINVILLE, JJ.

LESLIE V. LESLIE.

Will—Legacy—Condition—Absence.

Where property was bequeathed to a legatee on condition that he should pay to the executors a certain sum of money within five years after the death of testator, and the legatee failed to pay the said sum; held, that the legacy lapsed, notwithstanding that the legatee was absent at the time of the testator's death, and for more than five years afterwards.

The judgment complained of was rendered by the Superior Court, Beauharnois (Bélangier, J.), April 28, 1883.

TORRANCE, J. This was a petitory action to recover possession of a piece of land claimed by the plaintiff under a will in the following words : " I give unto my nephew David " Leslie the front half of the east half of Lot " No. 37 of the 1st range of St. Anicet, containing, &c., to be enjoyed and possessed " by him during his lifetime, and after his " death to become the property of his heirs, " provided he first pay unto the executors of " this, my last will and testament, the sum " of one hundred pounds currency, to be paid " within five years after my death, and allow " unto the said Julia Ann Gill and her daughters the possession and enjoyment of the " said lot of land, and until he paid the said " Marjory Leslie and Julia Leslie the sum of " £30 each; but I will it to be well understood " that it is my will that if the said David " Leslie fail to pay the said sum of £100 " within five years after my death, that he " shall have no claim whatever in or to said " lot of land in virtue of these presents."

The testator died in March, 1866. The plaintiff was then absent and only returned in 1876, and in 1879, offered defendant the £100.

The defendant met the action by pleading 1st, that more than five years had elapsed since the death of the testator and therefore the legacy had elapsed; 2nd, Possession for more than ten years as proprietor.

The judgment complained of dismissed the action because the £100 had not been

offered within the five years stipulated by the legacy and because it had not been consigned with the plea.

The defendant here contends that the condition attached to the legacy is only comminatory and resolatory, and a judgment of the Court is necessary to deprive him of it. The Court of Review holds that the judgment was correct.

Judgment confirmed.

Robidoux & Fortin, for plaintiff.

MacLaren, Leet & Smith, for defendant.

SUPERIOR COURT.

MONTREAL, March 5, 1884.

Before TORRANCE, J.

CHARBONNEAU, *ils ex qual.* v. CHARBONNEAU, *père.*

Procedure—Action by tutor—C. C. P. 19.

It is not necessary, in an action by a tutor, that the names and first names of the children for whom the tutor is acting should be set forth in the writ and declaration.

This was the merits of an exception *à la forme*.

The plaintiff sued in his quality of tutor to the minor children issue of his marriage with the late Dame Matilde Desjardins, &c.

The defendant filed an exception *à la forme*, on the ground that the writ and declaration did not contain the names and first names of the children for whom the tutor was acting.

PER CURIAM. The description of plaintiff is a sufficient compliance with C. C. P. 19 which says that tutors plead in their own name in their qualities.

Exception dismissed.

Cornellier for excipient.

W. Prevost for plaintiff.

COUR DE CIRCUIT.

MONTREAL, 14 mars 1884.

Coram JOHNSON, J.

D'ROCHER v. SARAUET ET LECLAIRE.

Frais du gardien sur exécution—Art. 562, C.P.C.

Le demandeur a fait exécuter son jugement contre la défenderesse. Cette dernière était absente de sa maison et n'a pu offrir un gardien, et l'huissier O. Daoust a nommé O.

Leclaire, gardien d'office. Ce dernier enleva les effets et les transporta à son domicile. La défenderesse présenta une requête pour la nomination d'un gardien de son choix, laquelle fut accordée, le premier gardien ayant dûment reçu avis de la présentation de cette requête. Jugement fut signifié au dit Leclaire et à l'huissier Daoust. Ces derniers refusèrent d'obtempérer au jugement, alléguant qu'au préalable les frais de garde devaient être payés. La défenderesse fit émaner une règle contre le gardien et l'huissier.

M. David, pour les mis en cause, prétend que le nommé Leclaire a droit de garder les effets saisis comme garantie de ses frais de garde.

M. Lareau, pour la requérante, répond que le jugement ordonnant la nomination du nouveau gardien n'impose pas cette charge à la défenderesse; et, en second lieu, le gardien n'a d'autre recours que contre la personne qui l'a employé, le demandeur. Cette saisie est contestée par une opposition afin d'annuler qui paraît bien fondée.

Vide Arts. 562 et 568, C.P.C.; Art. 1825 C.C. Pothier, Dépôt Nos. 92 et 96; Legal News, vol. 3, p. 86.

La Cour déclare que les prétentions du gardien et de l'huissier sont sans fondement, et la règle est déclarée absolue.

Lareau & Allard, avocats de la requérante pour règle.

David & Laurendeau, avocats des mis en cause.

GENERAL NOTES.

Mr. Buckle has been appointed the new editor of the *Times*. Mr. Buckle is but a young editor, being only about thirty years of age. There was, however, an admirable precedent. Mr. Delane on succeeding to the post had not reached his twenty-fifth year. A return of the age of editors would be extremely interesting reading. Take the great dailies. Mr. Mudford, of the *Standard*; Mr. Hill, of the *Daily News*; Mr. Edwin Arnold, of the *Telegraph*, are we believe in the "fifties," as are Mr. Hutton, of the *Spectator*, and Mr. Frederick Greenwood, of the *St. James' Gazette*, and Mr. Burnand, of *Punch*. On the other hand, Mr. Pollock, of the *Saturday Review*, is on the right side of thirty-five.

The cost of promoting bills in the British Parliament is enormous. From returns moved for last year our English exchanges learn that the railway companies (although forty have sent very defective returns or none at all) have spent about four millions. The Midland alone have spent £215,000, the Great Western £211,000, and the underground railways between them (though the expenses of the Outer Circle system are not included) £184,000. What the North-Western has spent cannot be ascertained, as they put down £615,000 for general, legal and parliamentary expenses. The gas companies have spent £356,000, the water companies £385,000; even canal companies £41,000, while tramway companies (thirty-nine of whom have sent no return) have got through £374,000, of which by far the largest proportion has been spent in the last three years. In fact, five millions have been laid out by these companies alone in ten years upon the unproductive expenditure of parliamentary litigation.

The Legal News.

VOL. VII. MARCH 29, 1884. No. 13.

APPEALS FROM THE CIRCUIT COURT.

In appeals from the Circuit Court to the Court of Queen's Bench is it obligatory on the parties to file factums?

The origin of the *factum* or case in our Court of Queen's Bench, as an obligatory proceeding, seems to be a rule of Practice, No. xxi, published by the Provincial Court of Appeals on the 19th of January, 1809.* It is as follows:—

"That the cases of the appellant and respondent in each suit and appeal to the number of six on each side, shall from henceforth be filed by the appellant or respondent respectively, in the office of the clerk of this Court, within ten days after the filing of the reasons of Appeal, and be by him distributed to the members of this Court who shall sit for hearing of such suit and appeal, &c."

The authority of the Court of Appeals to make this rule cannot be questioned. See Ord. 27 Geo. III. cap. 4, and 41 Geo. III. cap. 7, sect. 16. The rule remained in force till 1849, then the 12th Vict. cap. 37, sect. 16, enacted:—

"That all and every the Laws, which immediately before the coming into force of the Act hereinbefore cited and repealed, were in force in Lower Canada, to govern and direct the proceedings and practice of the Provincial Court of Appeals abolished by the said Act,

* See Rules and Orders of Practice for the Court of King's Bench, District of Montreal, February Term, 1811. Amended and augmented till the 20th June, 1823, to which is added the rules and orders of Practice in the Provincial Court of Appeals. Montreal, printed by T. A. Turner, No. 16, Notre Dame street, for Joseph Nickless, book-seller, 1823. It may be interesting to know who were present in the Provincial Court of Appeals when these rules were promulgated. They were: The Hon. Jonathan Sewell, Chief Justice of the Province, the Hon. and Right Rev. the Lord Bishop of Quebec, the Hon. James Monk, Chief Justice of the Court of King's Bench for the District of Montreal.

The Hon. Thomas Dunn,	Jenkin Williams,
Francis Baby,	P. Louis Panet,
James McGill,	P. Amable Debonne,
John Young,	John Richardson.

in so far as they are not repealed or varied by this Act, or by any other Act of this session, or inconsistent with the provisions of such Act or of this Act, shall continue to be in force and shall apply to and be observed in and by the Court hereby established, in the same manner as though they would have applied to and been observed in and by the said Provincial Court of Appeals, if neither the said Act nor this Act had been passed."

Section 17 further enacted:

"That the said Court, shall and may (and it shall be the duty of the Court so to do, within one year from the time when this Act shall come into effect,) make and establish a Tariff of Fees for the officers of the said Court and the Council, Advocates and Attorneys practising therein, and also such rules of Practice as shall be requisite for regulating the due conduct of the causes, matters and business before the said Court or the Judges thereof, or any of them, and in term or out of term, and all process and proceedings therein or thereunto relating; which tariff of fees and rules of Practice the said Court shall have full power and authority to repeal, alter and amend from time to time: Provided always, that no such rule of Practice shall be contrary to or inconsistent with this Act, or any other Act or law in force in Lower Canada, otherwise the same shall be null and void: And provided also, that until such tariff of Fees and Rules of Practice shall be made and duly established by the said Court, the Tariff of Fees and Rules of Practice in force immediately before the coming of this Act into full effect, with regard to the "Court of Appeals for Lower Canada," established by the Act hereinbefore cited and repealed, shall continue to be in force and shall apply to the Court hereby established and the proceedings therein, subject to such amendments and alterations as shall be from time to time made therein by the said Court."

The 12th July, 1850, rules were passed under the authority of the 12 Vict., the 14th of which is as follows:—

"That the cases of the appellant and respondent or plaintiff and defendant in error, in every suit in appeal, or error, to the number of ten (now forty, see rule of 21st June, 1879) on each side, shall be delivered by the

appellant and respondent, the plaintiff and defendant in error, respectively to the said clerk of this Court," &c.

In 1857 all formalities, excepting filing the petition and notice, were done away with in appeals from the Circuit Court, 20 Vic., cap. 44, sec. 68. But sect. 70 provides:—

"That said Court of Queen's Bench may, if it shall deem it expedient for the purposes of justice, order a *factum* or case to be prepared and filed in any such appeal as aforesaid, and may grant such delay and make such rules of practice touching such Appeals, or any class or classes of them, or such rules and orders in each particular case, as the said Court may deem just and right," &c.

The inconvenience of having appeal cases without *factums* was instantly felt. On the strength of this last section, the Court of Queen's Bench published the following rule of Practice:—

"That for the future, in appeals from the Circuit Court, the parties shall each produce a printed *factum*, in the same manner, within the same delay, and subject to the same penalties as are prescribed and established by the rule concerning appeals from the Superior Court; and the party appellant will not for the future, be obliged to furnish copies of his petition in appeal." [December 6th, 1859.]

The provision of the 20th Vict. was recognized by Statutes (C. S. L. C. cap. 77, sect. 49), and again in the Code of Civil Procedure (Art. 1152), and with the rule of practice has remained unaltered. It is not easy then to see how it can be maintained that in an appeal from the Circuit Court the parties are not obliged to file *factums*.

R.

FRIENDLY SUITS.

In the case of *Gurney v. Bradlaugh*, which came up not long ago before the Queen's Bench Division in England, the judges expressed themselves with some emphasis on the subject of "friendly" suits. As a misconception appears to exist on this head, it may be useful to quote the following note of the case from the *Times*:—

This was a demurrer to a reply of the plaintiff's. The plaintiff is a justice of the

peace for the borough of Northampton, and the defendant, Mr. C. Bradlaugh, one of the members of Parliament for that town. The action is brought to recover £500 penalty under the Parliamentary Oaths Act, 1866, because the defendant sat and voted in the House of Commons on February 21 and 22, 1882, without having made and subscribed the oath required. The defendant pleaded that he had made and subscribed the oath before so sitting and voting. The plaintiff replied that the defendant had read from a paper on the day in question, at the table, having first kissed a copy of the New Testament which he had brought with him, signing and leaving such paper. And the plaintiff set out the resolution of the House, of February 7, 1882, "that the defendant be not permitted to go through the form of repeating the words prescribed," and said the defendant performed the acts relied on by him in defiance of such order. To this the defendant demurred, asserting that neither the Act of 1866 nor 1868, nor the Standing Order of the House of Commons of April 30, 1866, required the person swearing to do so in any other form or manner; nor did they require the oath to be administered by the Clerk; and that the known and established laws of the land could not be superseded, suspended, or altered by any resolution or order of the House of Commons, and that the House of Commons in Parliament assembled could not by any resolution or order of themselves create any new privilege to themselves inconsistent with the known laws of the land, and that if such power be assumed by them there can be no reasonable security for the life, liberty, or property of the subjects of this realm.

Mr. Bradlaugh was just proceeding to open his case, when

MR. JUSTICE MANISTY interposed, and said that having carefully read the pleadings he had made up his mind that the Court ought not to hear the case. This action was brought with a view to obtain the opinion of the Court on an abstract question of law raised by a statement of facts. He did not think that enabled the Court to deal with the case. The Court could only decide when the whole facts were before them; and the plaintiff

might have raised the question by taking issue on the statement of defence. He cited the case of "*Doe dem. Duntze v. Duntze*," 6 C.B., 100, and said some people might think this action was brought for the benefit of the defendant, with no intention of ever enforcing the penalty, and with a view to get the decision of the Court.

MR. JUSTICE WATKIN WILLIAMS thought the case ought to be postponed until both plaintiff and defendant satisfied the Court that this was a *bond fide* action for a penalty said to be incurred. He said it was "friendly" from the obvious and studious omissions in the pleadings, and he thought it collusive, as there was neither a plaintiff nor a defendant in the ordinary sense of the words. It was brought to obtain the decision of the Court, and this was a sort of fraud and covin on the Court (which the Court had sometimes punished as a contempt by imprisonment), and such litigation should be stopped till affidavits were filed or some other steps were taken. He cited "*Hinkin v. Gerss*," 2 Camp., 408, where a feigned issue was raised; also "*Cocks v. Phillips*," in 1736, where the validity of Mrs. Phillips's marriage and the legitimacy of her issue were sought to be decided on an action on a promissory note for £100; and the case of the Chevalier d'Eon. After argument he might alter his opinion, but he thought the pleadings were purposely drawn in favour of Mr. Bradlaugh, and that, if argued, the case must be decided in his favour, so that the penalty would not be recovered, and it would be futile to protect him from another action for the penalty.

MR. BRADLAUGH felt it would be very impertinent in him after that intimation to obtrude any more observations. He had written to the Speaker, as he thought, after "*Stockdale and Hansard*," the House might wish to instruct the Attorney-General to appear. But he had received an answer saying the House would not interfere with the proceedings. It was vain to say this was not a friendly suit, as the plaintiff had so stated it to be at a public meeting.

MR. JUSTICE MANISTY.—That is very candid of you, but there is no controversy between you and the plaintiff.

MR. CRUMP wished to say that he was not

responsible for the pleadings; but no fact, as far as he knew, had been kept out of them that ought to have gone in. The Speaker had had the pleadings before him, and if he had objected to them would have said so.

GAILLOUX & BUREAU.

The case of *Gailloux & Bureau*, before the Court of Appeal at Quebec, of which a note appeared in our last issue, presented a question of considerable interest, and the judges who had to pronounce upon it were very evenly divided. The decision of Mr. Justice Bourgeois was reversed in Review by Stuart and Caron, JJ., Casault, J., dissenting; and the judgment in Review was confirmed in appeal by Monk, Ramsay and Cross, JJ., Tessier and Baby, JJ., dissenting. So, of the nine judges, five stand in favour of the judgment in appeal, and four against it. The proceeding was against a defendant under C.C.P. 646, for deterioration of a property under seizure. The defendant who had made a *délaissement* in a hypothecary action, had taken away a stable and fence put up by himself, from the property while it was under seizure, and when he was proceeded against under Art. 646, he answered that in his *délaissement* he reserved the right to take away his own improvements. The decision in appeal is to the effect that the reservation was null, and that the defendant came within article 646, C.C.P.

Since our note was published we have received a printed copy of the observations of Mr. Justice Casault who dissented in Review. It appears that his Honour concurred in the opinion that the reservation was null, but he thought that as the surrender had been accepted, though under protest, the sheriff could not sell more than had been surrendered. The following are some extracts from the opinion referred to:—

Je le répète, le défendeur n'avait pas le droit d'enlever ses constructions, et par conséquent ne pouvait pas les exclure du *délaissement* qu'il faisait du reste; mais le demandeur, au lieu de faire rejeter ce *délaissement*, l'accepte sous protêt et fait nommer un curateur au *délaissement*, procède à jugement qui, vu le *délaissement*, ordonne que l'immeuble hypothéqué sera vendu sur le cura-

teur au délaissement, fait saisir cet immeuble sur le curateur et le fait vendre. Il est vrai qu'après avoir délaissé, le défendeur a obtenu la permission d'opposer à l'action ses impenses, ce qu'il a fait par une exception produite le 19 mars 1881. Après avoir allégué les améliorations par lui faites et qui consistent dans une étable, des latrines, une clôture, une porte de cour au montant le tout de \$70.00, il conclut à ce qu'il ne soit condamné à délaisser qu'à la condition d'être maintenu dans son privilège pour cette somme. On comprend difficilement comment il a pu être permis au défendeur de plaider ses impenses et de conclure à ce qu'il ne fut condamné à délaisser qu'à la condition de conserver son privilège pour leur montant, sans révocation préalable du délaissement déjà fait et accepté, et que l'on ait attendu après l'enquête et audition au mérite de l'exception et de l'action tant contre le défendeur que contre le curateur, pour décider que le délaissement et son acceptation ne laissent pas au défendeur le recours par exception pour ordonner la vente sur le curateur. Le jugement réserve au défendeur son recours à l'ordre pour ses impenses, ce qui prête à croire que le juge ne considérait pas alors le délaissement comme partiel.

Le jour même de la vente par le shérif, le 3 juillet 1882, mais avant qu'elle eut été faite, le défendeur a fait enlever l'étable et une pagée de clôture, puis s'est rendu à la vente, y a enchéri et a averti le demandeur avant qu'il s'y soit porté adjudicataire qu'il avait démoli et emporté l'étable et cette partie de la clôture. Le 1er septembre suivant, le demandeur a, après en avoir donné avis au défendeur et aux trois personnes qui avaient démoli pour lui la bâtisse et la clôture, présenté une requête au juge en chambre demandant l'application de l'article 646 C. P. C., et que le défendeur et les autres fussent emprisonnés comme le veut cet article, qui règle que "le saisi ni aucune autre personne ne peut faire aucune coupe de bois ou dégradation" "quelconque sur les immeubles saisis, à peine d'un emprisonnement pour un terme n'excédant pas six mois, qui peut être prononcé par une ordonnance accordée par le tribunal, ou par un juge en vacance."

Le défendeur et les autres n'ont fait qu'une

seule réponse, tout en invoquant des moyens différents. Le défendeur dit qu'il n'avait délaissé que l'immeuble sans les bâtisses, que le demandeur a accepté le délaissement et n'a fait saisir et vendre sur le curateur que ce qui avait été délaissé, et qu'il avait été informé avant de se porter adjudicataire que les bâtisses avaient été enlevées, et les trois autres alléguaient qu'ils ont travaillé de bonne foi pour le défendeur qu'ils croyaient propriétaire des bâtisses qu'il leur a fait enlever. Le demandeur a examiné cinq témoins qui prouvent l'enlèvement de l'écurie qui avait été construite par le défendeur et d'une pagée de clôture, entre trois et huit heures du matin, le jour de la vente. Vaillancourt est le seul des trois personnes qui ont fait la démolition qui est prouvé avoir su que la propriété était sous saisie et avoir entendu dire qu'elle devait être vendue ce jour-là. Il admet que le défendeur lui a dit qu'il voulait que la démolition et l'enlèvement fussent complétés avant la vente.

Le jugement a renvoyé la requête avec dépens pour trois raisons: 1ère. Que le délaissement avait été fait par le défendeur sous la réserve des bâtisses par lui construites; 2ème. Que le tiers détenteur a droit d'enlever ses améliorations, s'il peut le faire sans dégrader l'immeuble; 3ème. Que le demandeur n'avait pas indiqué dans sa requête la partie de la clôture que le défendeur avait enlevée, et qu'elle pouvait être la partie appartenant au défendeur et à sa charge entre une autre propriété du défendeur et celle vendue.

La preuve ne justifie pas ce dernier motif. Elle établit que la partie enlevée de la clôture était entre la propriété vendue et une autre propriété n'appartenant pas au défendeur, mais elle ne constate pas qu'elle n'était pas une partie de celle à la charge du voisin, et qui pour cette raison n'aurait pas été un accessoire de la propriété vendue. L'absence d'une allégation positive et d'une preuve certaine sous ce rapport ne permettant pas de faire de cette partie minime de la clôture le sujet de la condamnation des parties incriminées. J'ai déjà exprimé l'opinion que le 2ème motif du jugement n'était pas fondé en loi. Mais je crois que le jugement doit être confirmé pour le premier motif. J'ai dit, il y a un instant, que la condition mise au

délaissement n'y pouvait pas être légalement apposée et que le défendeur n'en pouvait pas excepter les bâties par lui érigées, et le demandeur qui pouvait faire rejeter ce délaissement et procéder comme s'il n'en pas été au dossier, l'accepte comme valable, y fait nommer un curateur, obtient jugement ordonnant la vente sur ce dernier et fait saisir et vendre sur lui. Le curateur ne pouvait pas être mis en possession de plus que ce que délaissé, et on ne pouvait vendre sur lui que ce dont le délaissement et sa nomination l'avaient saisi. Les protestations du demandeur dans sa motion pour nommer le curateur ne changeraient pas le délaissement et n'en pouvaient étendre la portée. Le délaissement de la propriété avant la vente est l'acte du détenteur qui a renoncé à sa chose et l'a donnée: On ne peut pas sans son concours ajouter à cet abandon volontaire ou l'étendre. On peut le considérer comme non avenu et procéder sans y avoir égard s'il n'est pas ce que veut la loi. On peut aussi la faire rejeter du dossier et par une procédure sommaire, une simple motion, mais on ne peut l'accepter, puis prétendre qu'il ne comprenait pas assez et qu'on doit y inclure ce qui en est exclu en termes exprès et formels.

Encore une fois le curateur n'a pu être saisi que de ce que délaissé et rien de plus, et on n'a pu faire saisir et vendre sur le curateur que ce dont il avait été saisi, c'est-à-dire l'immeuble moins les bâties construites par le défendeur. Et si ces bâties n'étaient pas délaissées et n'ont pas été saisies, le défendeur n'est pas passible d'emprisonnement pour avoir enlevé ce qui n'était pas saisi. Ces remarques s'appliquent également à Vailancourt. Quant aux deux autres personnes que le défendeur a employées pour faire démolir et enlever l'écurie, l'absence de toute preuve qu'ils savaient que la propriété était sous saisie pourrait servir à les absoudre, s'il n'y avait pas une autre raison. Le code de procédure français ne donne la contrainte par corps que pour les dommages qu'a causés le saisi. Notre code article 646 qui est la reproduction imparfaite de la sec. 29 du ch. 85 des S. R. B. C., étend la punition qu'il décrète à toute autre personne, mais cela doit s'entendre de celles qui font, soit par elles-mêmes, soit par d'autres, des dégradations à la pro-

priété saisie. Ce n'est pas un recours pour les dommages que donne cet article de notre code de procédure. C'est une offense qu'il crée et une peine qu'il inflige. On ne peut être coupable de l'une, ni encourir la peine que lorsque l'on sait que l'on agit sans droit et sans autorité, et non lorsque l'on est qu'employé par quelqu'un que l'on croit exercer ses droits et ne pas excéder son autorité.

HUSBAND AND WIFE.

Some ladies in England appear to have unlimited faith in the resources of the recent Married Women's Property Act. The following report from an English journal, shows how a Mrs. Weldon fared, who had sued her husband for slander in saying that she was insane:

"The Lord Chief Justice—Who appeared on the other side?

Mrs. Weldon—Two or three barristers. (Laughter.)
Mr. Wood Hill—And I am one of them, my lord. (Great laughter.)

Mrs. Weldon—Yes, and Mr. Wood Hill says that this action is not maintainable in *tort* as it has no relation to property, but I say that a woman's reputation is her property.

The Lord Chief Justice—I am afraid that we cannot construe the act in the sense you would wish; it does not relate to character. I dare say, Mrs. Weldon, you have read Shakespeare?

Mrs. Weldon—I have, and I have got it here. I will read the passage—

'Who steals my purse steals trash; 'tis something, nothing;

'Twas mine, 'tis his, and has been slave to thousands,
But he that filches from me my good name
Robs me of that which not enriches him,
But makes me poor indeed.'

The Lord Chief Justice—Yes, 'that not enriches him.'

Mrs. Weldon—Yes; he took away my money and my house, which made him very rich. I only wish I could get rich so easily. (Laughter.)

The Lord Chief Justice here reminded Mrs. Weldon of the provisions of the Act of 1882, declaring that 'except as aforesaid' no husband or wife was entitled to sue one another in *tort*.

Mrs. Weldon—It would be a very good thing if all the women in England knew that. (Laughter.) Then I can't catch him in any way? (Great laughter.)

The Lord Chief Justice—Certainly not in this way. (Renewed laughter.)

Mrs. Weldon—So that a husband can libel his wife or do anything he likes. It is a very good thing that we were not told this before we got married, or else the men would be very badly off. (Great laughter.)

The Lord Chief Justice—Your appeal is dismissed.

Mrs. Weldon—Very well. I don't see that the Married Woman's Property Act is of much good. (Laughter.)"

DUROCHER v. SARAULT.

The note of this case on p. 96 was printed as handed to us by one of the counsel, but it appears that the counsel on the other side take exception to the presentation of the case. They write :

"Le rapport indique comme prétention des mis en cause, que le gardien d'office a un droit de rétention sur les effets saisis jusqu'à paiement de ses frais d'enlèvement et de garde. La contestation de la règle ne portait pas sur cette question, déjà décidée à maintes reprises. Nous prétendions que la règle émanée ne pouvait être déclarée absolue parce que les mis en cause n'avaient jamais refusé d'obtempérer à l'injonction du tribunal leur ordonnant de livrer les effets au nouveau gardien ; qu'ils avaient toujours été prêts à livrer les dits effets, et qu'ils l'étaient encore à première réquisition du gardien volontaire et aussitôt qu'on leur offrirait l'opportunité de dresser procès-verbal. Le Juge Johnson décide que ce n'est pas au nouveau gardien à faire les démarches nécessaires à sa prise de possession des effets, mais bien au gardien d'office, qui doit même avancer les déboursés de transport."

NOTES OF CASES.**COURT OF QUEEN'S BENCH.**

MONTREAL, February 26, 1884.

Before DORION, C.J., MONK, RAMSAY, TESSIER, & BABY, JJ.

LORD et al. (defts. below), Appellants, and DUNKERLY (plff. below) Respondent.

Charter-party—Demurrage—Loading "with all despatch"—Custom of port—Tenders of large steamships.

The stipulation in a charter-party, that the vessel shall be loaded with all despatch, is to be interpreted as meaning according to the custom of the port, which in this case was that vessels should be loaded in their due turn, as reported.

There was evidence that by the custom of the port extra large vessels were loaded by tender ; held, that the lighters of such vessels were entitled to be loaded whenever they came

into port as though the vessel herself were there ; more especially as the lighters were only taking "bunker" coal for the vessel they were attending, i.e., coal for consumption, which by the regulations of the port had precedence over coal for cargo.

The appeal was from a judgment of the Superior Court, Montreal, (Torrance, J.), reported in 3 Legal News, p. 176.

RAMSAY, J. This case presents a great resemblance to the case of *Lord & Elliott*, decided in favour of the appellant in this Court, but which has since been reversed by the Privy Council.* It appears to me that the likeness is only superficial, and that the judgment now to be rendered must turn on a question totally different from that decided by the Privy Council.

The charter-parties in the two cases are not precisely similar, but it is important to consider their differences, as we view this case. Both fixed no specified time for discharging and loading, and both had express stipulations that the charterers should use despatch. In the former case the majority of this Court considered that in a coaling station such as Sydney, where the pier is merely the continuation of the mines, the facilities of the mines had to be considered in giving a fair interpretation to the charter-party. The Privy Council took a different view, and basing their judgment on the answer of Mr. Gisborne that "the facilities of the pier were greater than the production of the mine," they held, that "in consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port, by which the loading of the "Hibernia" was delayed. This deficiency of coals was the cause of the "Gresham" not sooner obtaining her cargo." Probably in this case the same question could not arise, for the charter-party contains a stipulation not to be found in the other, namely: That the "Tagus" should load in the usual manner, with a full and complete cargo of coals, which was to be brought alongside, as is customary at ports of loading and discharge. There is also no evidence to establish that the facilities of the pier were greater than

* See 6 Legal News, p. 146.

the production of the mine, or that there was any lack of coal at the mine or at the pier.

But the question of diligence in this case turns upon the regularity of turn. It is contended that lighters or vessels attendant on the "Great Eastern," then employed in laying the Atlantic cable, at a distance of at least 500 miles from the Port of Sydney, had precedence in loading over vessels reported before them. The argument used by Mr. Gisborne is this—the "Great Eastern" was reported before the "Tagus," and her lighters had to be loaded whenever they came into port, just as if they had been the "Great Eastern" herself. Another argument is, that the "Tagus" had no right to her turn till she had discharged all her ballast, which she did not do till the 30th June, and this by the regulations of the port, which are dated the 1st of July, 1873, the day after the "Tagus" was clear of ballast.

There is a manifest contradiction in these arguments. If it be a good reason to say that a ship has no right to her turn till she is quite clear of ballast, then the "Great Eastern" never had a right to turn, for it will scarcely be contended that the "Great Eastern" was without ballast when laying the Atlantic cable several hundred miles from shore. Again, the ballast rule is not shown to be in force, for the reason given, that the date appeared to be the 1st of July because the printers at Sydney work slowly, is simply absurd. A resolution is not dated the day it is printed, but the day it is passed. Further, the rule is without meaning, except in so far as the ballast being on board renders the ship unfit for loading. In this case it is proved, without contradiction, that the "Tagus" was ready to receive cargo on the 16th June, and that it was Mr. Gisborne who told the Captain not to throw out all his ballast.

This, however, is not the point upon which the court considers the case turns. Mr. Gisborne swears that all extra large vessels are loaded by tender, "that it was the custom to load all high vessels and war ships by tender at the port of Sydney. In fact, it is the custom of all ports." Very little evidence on this point will suffice, for it is difficult to

see how it could be otherwise, unless all vessels that could not come to the pier, were to be excluded from coaling. Besides, the coal for the "Great Eastern" was not a cargo, it was coal with which to move, and therefore, by necessity, it followed the rule for bunker coal. If there was not a rule of that description in all coaling stations, steamships would come to a stand-still, and the first persons to suffer from such short-sighted policy, would be owners of steamers like Mr. Dunkerly.

The question of turn depends entirely on this. It is true the certificate of the port entry books is not a very satisfactory document, but Mr. Gisborne states that no vessels but the "Great Eastern's" lighters passed before the "Tagus," and the Captain's evidence seems to confirm this. Moreover the appellants have not attempted to show that precedence was given to other vessels.

We are therefore to reverse and to dismiss the respondent's action with all costs.

TREBILCOCK, J., dissented.

Judgment reversed.

Kerr & Carter, for appellants.

Lunn & Cramp, for respondent.

SUPERIOR COURT.

[In Insolvency.]

MONTREAL, December 29, 1883.

Before PAPINEAU, J.

DILLON, petitioner for discharge, and BEARD, contestant.

Insolvent Act of 1875—Petition for discharge—Contestation of validity of assignment.

The validity of an assignment in insolvency may be contested on the application of the insolvent for his discharge.

The insolvent presented the usual petition, after the year and a day from his insolvency, for his discharge.

Beard contested on various grounds, among others that Dillon never was or had been a trader; that the proceedings to put him into insolvency were collusive and virtually to permit him to obtain a discharge of his debts.

Dillon demurred to this part of the contestation, alleging it did not constitute a legal ground; that the proceedings to put Dillon into insolvency or their legality or

regularity could not be thus contested; the only remedy was the petition under the Act, within the five days from the insolvency, to set aside the proceedings.

PAPINEAU, J., rejected the demurrer, holding that a creditor was entitled to contest the regularity of the proceedings, on the application for discharge, and if a party had never been a trader or entitled to the benefit of the Act, the Court would not grant him his discharge.

Demurrer dismissed.

Mercier, Beausoleil & Martineau, for the petitioner.

Church, Chapleau, Hall & Atwater, for creditor contesting.

SUPERIOR COURT.

MONTREAL, March 29, 1884.

Before TORRANCE, J.

PROSSER et vir v. CREIGHTON.

Action for malicious prosecution — Essential averments.

1. *It is not necessary, in an action for malicious criminal prosecution, to allege that the justices before whom the plaintiff was brought had jurisdiction.*
2. *It is, however, essential to aver that the prosecution complained of has been terminated.*
3. *Where the plaintiff in such case is a woman separated as to property, it is essential to state in what way she is separated, whether judicially or by ante-nuptial contract.*

This was an action of damages by a married woman separated as to property from, and authorized by her husband, John Napier Fulton, for malicious criminal prosecution. The defendant filed an exception *à la forme*, 1, because no intelligible cause of action was set forth in the declaration; 2, because it does not appear in the declaration how the female plaintiff is separated as to property, whether judicially or by ante-nuptial contract.

PER CURIAM. One of the objections of the defendant appears to be that no jurisdiction is shown by the declaration in the Court or justices before whom the charge was made. This is not material as it has been settled that an action may be supported for a mali-

cious prosecution of a defective indictment and case may be supported for a malicious arrest in a court having no jurisdiction, and therefore it seems not material to allege or show that the justices, &c., had competent authority. 2 Chitty, Pleading, p. 412, note (y), London, 1836.

But there is another objection to the declaration, which is fatal. It does not appear that the prosecution complained of has been terminated. 2 Chitty, p. 411. Also, *Barclay v. Matthews and wife*, 2 Common Pleas, 684, A.D. 1867. *Vide* authorities: Fisher's Digest *vo*. Malicious arrest, 5623-5; Termination of prosecution.

It is also a fatal objection that the separation as to property of the female plaintiff is not set forth with sufficient particularity. Defendant is entitled to know precisely with whom he is dealing, in order to know what his recourse in the future may be. 1 Pigeau, 64 of edition of 1787, says: "On ajoute à l'égard des femmes mariées une troisième chose, qui est que la loi ou leur contrat de mariage leur ait réservé valablement cet exercice, ou que la justice le leur ait rendu; autrement elles ne peuvent le diriger."

Exception maintained.

R. D. McGibbon, for plaintiffs.

Maclaren, for defendant.

GENERAL NOTES.

The new Speaker, says the *St. James' Gazette*, is 54 years of age. Sir Henry Brand, it may be observed, was 57 at the date of his elevation to the chair; so was Mr. Evelyn Denison. The veteran Lord Eversley, who last Friday completed his nineteenth year, had lived but 45 when the Commons of Her Majesty's first parliament chose him to preside over their debates. His immediate predecessor, Mr. Abercromby, had entered on his sixtieth year at the time of his election, being thus considerably older than the gentleman whom he virtually if not theoretically displaced. Sir Charles Manners Sutton had been called to the chair at the age of 37, and retired into private life at the age of 55. Mr. Speaker Abbott was 44 when he entered on his high functions; Sir John Mitford, 52; Addington, 32. The case of Addington is worth noting, for, though an incompetent minister, he was allowed by his opponents to have proved an excellent Speaker. Macaulay thought that if Addington had remained in the chair long enough he would have left a reputation equal to that of Onslow himself. Grenville, on whose resignation Addington was elected, was but 29 when he quitted the chair. The premier whose cabinet he entered was just 30; one of his colleagues, the First Lord of Admiralty, not 33. Arthur Onslow had the Speakership from his thirty-eighth to his seventy-first year. An octogenarian Speaker it would probably be impossible to find in the whole list.

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No. 14.

THE ORR EWING CASE—CONFLICT BETWEEN THE SCOTCH AND ENGLISH COURTS.

A case has occurred in Scotland, which has attracted a great deal of attention, and has brought up an interesting question as to the jurisdiction of the courts in that country. The facts as we find them stated in the judgment of the Court of Session are in substance as follows:—John Orr Ewing, a merchant of Glasgow, died on the 15th of April, 1878, domiciled in Scotland. His settlement was executed according to the forms of Scotch conveyancing. He was the owner of a landed estate in Dumbartonshire, and the great bulk of his moveable property was at his death situated in Scotland, the proportions being £435,314 (or fifteenth-sixteenths) in Scotland, and £25,235 (one-sixteenth) in England. All the trustees are Scotchmen, but two of them are resident in England. The testator had no English creditors, and none of the purposes of the estate required to be performed in England. The trustees proceeded to make up their title to the personal estate by presenting an inventory in the Commissary Court of the county of Dumbarton, including the English as well as the Scottish moveables, and having obtained confirmation from the Commissary, in terms of section 9 of 21 and 22 Vict., c. 56, and had the confirmation stamped with the seal of the Probate Court in England, under section 12 of the same Act, they reduced the personal estate into possession. They were thus duly vested by a decree of the Judge of the Commissary Court of Dumbartonshire, pronounced under express statutory authority, with the whole personal estate of the deceased, and having brought the English assets to Scotland, they proceeded to administer the trust according to the usual practice in that country. Such administration by the laws of Scotland required no further legal proceedings after the title of the trustees had been completed by confirmation as executors.

While the trustees and executors were in the course of administering the estate according to the directions of the testator, an "administration suit" was instituted in the Chancery Division of the High Court of Justice in England, and was afterwards carried on in the name of Mr. Malcolm Hart Orr Ewing, a minor interested in the residue, and orders have been pronounced against the defenders in that suit, the effect of which would be to supersede the trustees in the performance of the duties entrusted to them by the testator, and to put the management and distribution of the estate entirely in the hands of the Chancery Division. The other persons interested in the residue then brought suit in Scotland, and averred that the effect of the orders pronounced by the Chancery Division will be to cause the making up of accounts, which are altogether unnecessary, to transfer the personal estate in the defenders' hands from Scotland to England, together with the writs, evidents, and securities thereof, and so place them beyond the control of the defenders as trustees, and beyond the jurisdiction of the Courts of Scotland, and thereby defeat the diligence and process otherwise competent to the plaintiffs, and tend to lessen, if not destroy, the value of their interests in the estate. They further averred that these proceedings will cause great and unnecessary expense to the estate, and diminish the amount of the residue to which they are entitled. Lastly, they averred that the defenders, in obedience to the orders of the English Court, hold themselves not to be entitled to make any payment out of the estate without the special authority of the English Court, or some official thereof.

On these allegations the plaintiffs or "pursuers" asked that the trust estate be administered in Scotland according to Scotch law, and subject to the jurisdiction and control of the Scotch Courts, and that no part be removed beyond the jurisdiction of the Court. They also asked that a judicial factor (whom we should term a "sequestrator") be appointed, to supersede the action of the trustees until they should be relieved from the difficulties in which they are at present placed by the orders of the English Court.

The Court of Session unanimously main-

tained the action. The Lord President in rendering judgment observed:—

"It is evident that if we pronounce judgment in terms of all or any of these conclusions against the defenders there will arise immediately a conflict of jurisdiction between this Court and the Chancery Division of the High Court of Justice in England. This is a very serious matter, and we must therefore deliberately consider (1) what are the relations of the two Courts, and (2) what are the grounds on which the jurisdiction of each Court to deal with this trust estate is maintained. I. As to the relations of the two Courts, I hold that, in proper questions of jurisdiction such as the present, *the judicatories of Scotland and England are as independent of each other, within their respective territories, as if they were the judicatories of two foreign States*. I am anxious to formulate this rule, which is the necessary result of the Treaty of Union, with as much accuracy and precision as possible, because a loose and illogical statement of so important a constitutional doctrine is both dangerous and misleading. I have been, however, so much accustomed to regard it as an incontrovertible position that I was somewhat surprised to read in the Chancery proceedings which have been laid before us this passage in the judgment of so very learned and able a judge as the late Master of the Rolls: 'I caught during the argument an expression to which I do not assent. Scotland was called a foreign country—a foreign jurisdiction. All that in my opinion is quite erroneous. Ever since the union of the kingdom of Great Britain, Scotland has been an integral part of Great Britain; it is not a foreign country.' I sympathize with the learned judge so far that Scotland and England cannot with strict propriety be spoken of as being in the relation of foreign countries. But as the proposition with which he was dealing was, as he says, only 'caught during the argument,' he was probably misled by inaccuracy of expression; and the proposition itself, if expressed more precisely, might have commanded his serious attention. I do not say it would probably have altered his judgment on the case before him. But it might have enabled him to avoid what follows in the statement

of his opinion: 'To talk of Scotland as a foreign country, and to say that the same rules apply, is, I think, a total error. It is not only an integral part of this kingdom, but *the judgment of this Court can be enforced in Scotland in the same way that the judgment of a Scotch Court can be enforced in England*. But there is more than that. In the case of a foreign country there is the difficulty of ascertaining the foreign law, and where questions of foreign law arise, it is certainly very inconvenient to try them by the sworn and unsworn testimony of advocates and experts as to what the law is. It is much more convenient, of course, to obtain the decision of the judges of the country on the law of their own country. Well now, what has the Legislature done? Recognizing that the Legislature has empowered the English Courts, where a question of Scotch law arises in the course of English litigation, to take the opinion of the Scotch Courts, which they are bound to give, and correlatively has empowered the Scotch Courts to take the opinion of the English Courts on a point of English law arising on Scotch litigation, there is therefore no difficulty at all in deciding a point of Scotch law in England, because they decide it not in England, but in Scotland, and so with regard to English law in Scotland, because that would be decided in Scotland; all those difficulties are therefore purely imaginary.' Before advertising further to the reasons which seem to have led the learned judge to the conclusion that in questions of jurisdiction Scotland and England do not stand in the relation of foreign kingdoms, the Lord-President cited one very weighty authority, which is in terms contradictory of this proposition. In the appeal to the House of Lords from this Court regarding the guardianship of the present Marquis of Bute, Lord Campbell, as Chancellor, thus expressed himself:—'I beg to begin by observing that, as to *judicial jurisdiction*, Scotland and England, although politically under the same Crown, and under the supreme sway of one united Legislature, are to be considered as independent foreign countries, unconnected with each other.' The Master of the Rolls seems to have been misled into the opinion he expressed, in op-

position to this high authority, by the supposed operation and effect of recent statutes providing for the enforcement of Scottish judgments in England and of English judgments in Scotland, and also for the more convenient ascertainment of the law of one part of the United Kingdom by a Court in another part. By what is known as 'The Judgments Extension Act,' 31 and 32 Victoria, c. 54, a judgment of a Court of Common Law in England for debt, damages, or expenses (*but not an order or decree of the Court of Chancery*), may be enforced in Scotland by the party holding the judgment producing to a registrar in Scotland a certificate of the judgment, and having it registered. And *converso*, a judgment by this Court for debt, damages, or expenses, (but not any other kind of order or decree), may, by a corresponding proceeding, be enforced in England. But this gives no jurisdiction to the Scotch Court in the matter of the English judgment, nor jurisdiction to the English Court in the matter of the Scotch judgment; the one remains an English judgment throughout, though endorsed, so to speak, by a Scotch official under the authority of the statute, and the Scotch judgment also remains throughout a Scotch judgment, though endorsed by an English official under the like authority. The 22d and 23d Vict., c. 63, 'to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof,' provides in effect, that in any suit or proceeding, when the facts are ascertained, a case may be submitted by a Court in Scotland to a Court in England to ascertain the law of England applicable to such facts, or by a Court in England to a Court in Scotland, to ascertain the law of Scotland applicable to such facts. But how the passing of such an Act can affect the jurisdiction of any of the Courts in Scotland or England, or their relation to one another in the matter of jurisdiction, does not at all appear. These very convenient reciprocal provisions for the enforcement of Scotch judgments in England and English judgments in Scotland, and for the more convenient ascertainment by any Court of the law which that Court does not judicially

know or administer, are authorized by Acts of the Imperial Legislature of the United Kingdom. But the same reciprocal advantages and conveniences might be brought about in the case of English and French Courts, or of Scottish and Dutch Courts reciprocally, not, indeed, by an Act of the Parliament of the United Kingdom, but by treaty or convention; and it could hardly be contended that the effect of such treaty or convention would be to affect the relation of these Courts to one another in a conflict of jurisdiction."

The judicial factor having been appointed, the agents of the trustees declined to allow him to take possession of the books and documents, and it became necessary to make a new application to the Court of Session "to grant warrant to messengers-at-arms" to take possession of the books, etc. The Court as a matter of course immediately granted the necessary warrant to enable the judicial factor to enter into possession. The trustees had refused in the first instance to let the judicial factor assume possession, in order that they might be able to say to the English Court that they had not voluntarily parted with the assets, and that they were constrained by force. The conflict is thus made one solely between the Courts, the trustees being freed from all responsibility in the matter.

The Scotch journals are somewhat absurdly excited on the subject. "The Orr Ewing case," says the *Scotsman*, is but the flag under which a great and most important battle is being fought—a battle which can only end in victory for Scotland. The encroachments of English Courts have been tolerated too long, and, as a consequence, they have been pressed beyond endurance. The spirit shown in England in regard to the matter is in strict accordance with that which guides the treatment of most Scottish matters. Scotland is dealt with as if she had no rights and no national institutions. Governmental officials will not consent to believe that Scottish affairs are worthy of notice. Scottish demands for attention are disregarded, no matter how well grounded they may be. All this has gone on for long, and has become intolerable. The demand for a Scottish Secretary is, in effect, part of the protest against it, and a most im-

portant part. Scotland, it is seen, needs a representative in the Administration, who shall be able and willing to see that, on the one hand, she has due attention to her requirements, and, on the other, that her rights are not trampled upon. The action of the Court of Session will give a powerful impulse to this demand. That action raises, in legal form, a direct conflict between England and Scotland, and in this way shows that Scotsmen have institutions of their own which they prize, and which cannot be set aside by the will or by the neglect of Englishmen."

THE CINCINNATI RIOTS.

Everybody has been horrified this week at the sacrifice of innocent blood in Cincinnati; yet, upon the whole, we are not sure that this is not one of those outbursts of which the permanent effect is wholesome. If *Messieurs les meurtriers* would only cease killing, capital punishment with all its disgusting concomitants would speedily die out, and just as truly, if justice were speedily and fearlessly executed by the regular machinery, lynch law would soon be a thing of the past. The outbreak in Cincinnati resulted from what appears to be a serious miscarriage of justice. Our contemporary, the *Weekly Law Bulletin* (Cincinnati, O.), March 31st, referred to the case (before the riot), in these terms:

"The result of the Berner murder trial last week in Cincinnati has caused the deepest feeling among all classes. Six times the prisoner had confessed to his participation in the most brutal and cold-blooded butchery, giving all the details of the horrid affair, and only a few days before his trial had offered to plead guilty to murder in the second degree, the prosecutor refusing on behalf of the public, as the evidence was absolute and unquestioned. Yet the jury brought in a verdict of manslaughter only. The finding is condemned in the severest terms everywhere, by the people and by the papers. The changes in the jury law just made by the present legislature come none too early, and, it is to be hoped, will give us better and more competent juries."

The subject is not overlooked by the class who think, and as an evidence of this we may quote from the writer of the article,

"Mob or Magistrate," in the *Century* for April. It appears that in 1883 there were about 1,500 murders reported in the United States, and only 93 executions. When we reflect what this means it is not surprising to hear that the lynchings were more numerous than the lawful hangings, there being 118 cases of lynching during the year. Lynch law among other defects is, of course, open to the very evident objection that grievous mistakes may be made. The self-constituted executioners may hang the wrong man. But the remedy is to make the ordinary modes of dealing out justice swift and certain. The writer in the *Century* puts the case strongly but truly when he says:—"The fact that thirteen out of fourteen murderers escape the gallows is the one damning fact that blackens the record of our criminal jurisprudence. No American ought to indulge in any boasting about his native land, while the evidence remains that the laws made for the protection of human life are thus shamelessly trampled under foot. No occupant of the bench, and no member of the bar ought to rest until those monstrous abuses which result in the utter defeat of justice are thoroughly corrected." We might be pardoned if we added with some pride, that in Canada, where we follow the English practice of hanging every murderer, and of hanging him promptly, a case of lynching has hardly ever been known.

THE SEDUCTION BILL.

On the 31st ultimo, the Seduction Bill, in its amended form, came before the Senate, when it appeared that a majority of the House were opposed to the measure, and the three months' hoist was carried on division. Mr. Dickey remarked that the bill had been objected to by "the highest judicial authority in Ontario." It is also well known that the disapprobation of the most experienced judges in Quebec is equally emphatic. There was one portion of the bill, however, which seems to be called for, and which, alone, would not have met with any opposition; we refer to the clause with regard to inveigling young women into houses of ill-fame. This is an offence of a serious character, and the Government have promised to introduce a measure next session which shall provide for its punishment.

JUDICIAL BREVITY.

Chief Justice Waite, of the Supreme Court of the United States, sets a laudable example in the matter of short judgments. The *American Law Record* (of Cincinnati, O.) quotes two examples. In one case (infringement of a patent) the opinion of the Chief Justice occupies just six lines of type, and in the other case just five lines, which we will print as an illustration:—

"This judgment is affirmed. One partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted in his own name alone, against the debtor. That is the only question presented by the bill of exceptions in this case. The refusal of the Court below to grant a new trial is not reviewable here. Affirmed."

There are judges not a hundred miles from this Province who would have filled ten to fifteen pages of printed matter in either of these cases. We have already expressed the opinion that the longest judgments are generally the most useless. Every day we see illustrations. The Privy Council disposes of the most complicated cases in a few pages; division and county court judges struggle with the most simple case in a manner which suggests the remark that they are suffering from diarrhoea.... of words!

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, March 29, 1884.

Before TORRANCE, J.

MARTIN V. DANSEBREAUX.

Compensation—Universal legatee—Doctor's bill.

1. An indebtedness arising out of alleged joint transactions between the defendant and a deceased person, cannot be pleaded in compensation to an action by the universal legatee of the latter for a *prix de vente*.
2. But (a) monies paid out by defendant for deceased; (b) monies received by the deceased to the use of defendant, and (c) the amount of a bill for professional services rendered by the defendant as medical attendant to the deceased, may be pleaded in compensation to an action of the nature mentioned above.

This was the merits of an answer in law to a plea of compensation. The action was to recover the sum of \$398.89, amount of a price

of land. The plea set up an indebtedness by plaintiff as universal legatee of the alleged debtor of \$1,022, consisting of: 1st. \$111.25 arising out of certain joint transactions between defendant and deceased. 2nd. \$206.17, paid out by defendant for deceased. 3rd. \$519.60, money received by the deceased to the use of defendant. 4th. \$185.25, amount of a bill for professional services rendered by defendant as a medical man to the deceased.

PER CURIAM. The defendant objects to these items in compensation as not liquid or easily liquidated, and as arising out of transactions in partnership between defendant and the deceased. As to the item of \$111.25, the Court is with the defendant. There appear here to be items of account between the two which cannot be or can with difficulty be settled in this cause. As to the other items they are rightly offered in compensation. 28 Demolombe, No. 525, mentions this very case of a doctor's bill under C. C. (Nap.) 1291, and cites in support the Cour de Cassation; *vide* T. Gen. vo. Compensation, 5. Médecin.

Apart from these four items, the plea begins by pleading a tender of \$31.35 to the plaintiff, with claim of indebtedness by the deceased to defendant of \$364.77, without particularizing the cause of indebtedness and without invoking this indebtedness in answer to the demand. The Court regards this alleged tender as an excrescence which should be struck out of the plea, being there irregularly and to no purpose. The judgment strikes it out, as also the item of \$111.25, and allows to stand the other three items.

Archambault & St. Louis for plaintiff.

Prefontaine & Co. for defendant.

SUPERIOR COURT.

MONTREAL, March 14, 1884.

Before DOHERTY, J.

WEINROBE V. SOLOMON.

Saisie-arrest before judgment—Petition to quash.

An affidavit alleging that the defendant "has secreted" his property, or "has absconded," without indicating any time when such secretion or absconding has taken place, is insufficient, and does not comply with article 834, C. C. P.

The affidavit in this case alleged a personal

indebtedness of \$140 for money lent in December last; and the second and third paragraphs of the affidavit were as follows:

"That the defendant has secreted and made away with his property and effects with intent to defraud the plaintiff in particular."

"That the defendant has also absconded from the Province of Quebec and gone to reside in the United States of America, with intent to defraud the said plaintiff in particular."

The defendant's petition set up, among other grounds, that the affidavit was insufficient in law, because the words "has secreted" and "has absconded," without specifying any time, were too indefinite and might mean a secreting and an absconding committed twenty years before the debt sued for was contracted; and, moreover, that these words were not a compliance with the requirements of article 834 C. C. P., which provided for an affidavit establishing that the defendant is absconding or about immediately to leave the province, or is secreting or about immediately to secrete his property.

DOHERTY, J. The affidavit being insufficient in law, and particularly so in the second and third paragraphs referring to secretion and absconding, the conclusions of the defendant's petition are granted; the attachment is therefore quashed and *main-levée* granted to the defendant of the seizure of goods made thereunder, with costs against the plaintiff.

Macmaster, Hutchinson & Weir for the plaintiff.

James Crankshaw for the defendant.
(J. C.)

SUPERIOR COURT.

MONTREAL, March 14, 1884.

Before DOHERTY, J.

BURNETT v. POMEROY et al.

Saisie-arrest Conservatoire—Petition to quash.

An affidavit such as is required by the Code for a *saisie-arrest* before judgment, is not necessary for a *saisie-arrest conservatoire*, which is a common law process, and cannot be attacked by petition to quash.

The plaintiff sued the defendants for \$174, his charges, as a carrier, for removing and packing furniture and goods in a house occupied by Mrs. Sylvia Smythe, one of the defendants: the plaintiff, while performing the work, being compelled to give up possession of the goods, by guardians appointed under certain executions issued against Mrs. Smythe and opposed by the other defendant, Pomeroy. On the strength of his lien over the goods the plaintiff accompanied his action with a *saisie-arrest conservatoire*, which the defendants now attacked by petition to quash, upon the grounds (*inter alia*), that the plaintiff had not complied with the requirements of the articles of the Code of Procedure relating to seizures before judgment, and further that the plaintiff had no lien on the goods, and even if he ever had such a lien he had relinquished it by giving up possession. The plaintiff answered that a petition to quash only applied to the special cases of seizure before judgment provided for by the Code, and that a *saisie-arrest conservatoire* must be met by ordinary pleading; and cited, among other cases, *Trudel v. Trahan et al.*, 7 Revue Légale, p. 177 (1874).

DOHERTY, J. This seizure being a *saisie-arrest conservatoire*, it is not the subject of nor attackable by a petition to quash: and an affidavit such as is required by the Code in matters of *saisie-arrest* before judgment not being required to support the common law conservatory process taken in this case, the defendant's petition to quash is dismissed with costs.

James Crankshaw for the plaintiff.
Quinn & Weir for defendants.

(J. C.)

COURT OF REVIEW.

MONTREAL, JAN. 31, 1884.

Before JOHNSON, JETTÉ & LORANGER, JJ.

SANCER v. GIRARD.

Tender as to one branch of demand—Costs.

The inscription was by the defendant on a judgment of the Superior Court, Montreal, Doherty, J., Oct. 13, 1883.

JOHNSON, J. The judgment which the defendant here complains of condemned him to pay the plaintiff \$110.48 with interest and costs.

The facts are that in March last the defendant being insolvent, made an assignment to Moisan & White who were to proceed and liquidate the estate; and they employed the plaintiff to examine the books, and report to the creditors who were to meet, and did meet shortly afterwards. Subsequently, the defendant having made an offer of composition, he required the plaintiff to prepare a deed of composition and discharge, and a dividend sheet in conformity with it, which was done, and the defendant resumed his estate. The plaintiff by his action claimed \$6 a day for thirty-three and a quarter days' work in making the inventory and statement of assets, and \$50 for the deed of discharge and composition and the dividend sheet, and obtaining the signatures of the creditors.

The defendant pleaded that a specific sum of \$60 had been agreed upon between the plaintiff and Moisan & White for making the inventory and the statement of affairs; and that for the rest he was entitled to nothing; but he nevertheless offered \$26—making altogether \$86 less the \$17.52 which he acknowledged to have got; but he only made this offer conditionally upon the plaintiff paying the costs incurred by the defendant, which condition the plaintiff rejected by his answer.

Looking at the evidence we find the judgment perfectly equitable. It found the sum of \$26 tendered sufficient in amount on that head, and gave no more as far as that part of the case was concerned. The defendant interprets this to mean that his offer of \$26 has been declared technically to be good and sufficient in law; but that is not the case, for all that the judgment does is to give so much upon the first branch of the case, and so much on the second, so that on the whole the offers are not sufficient; and this disposes substantially of the whole of the case.

Judgment confirmed.

Robidoux, for plaintiff.

Ethier & Co., for defendant.

COURT OF REVIEW.

MONTREAL, January 31, 1884.

Before JOHNSON, JETTE & MATHIEU, JJ.

COUTU V. LEFEBVRE.

Slander—Compensation of damages.

The inscription was by the plaintiff from a judgment of the Superior Court, Montreal, Loranger, J., Dec. 3, 1883, dismissing the action.

JOHNSON, J. This was an action for damages laid at \$5,000 for verbal slander by the defendant of and concerning the plaintiff and the plaintiff's wife. The plea denied the slander, and set up in compensation defamatory words used by the plaintiff concerning the defendant. The whole case was put before the learned judge who heard the witnesses at the proof and hearing sittings, and could judge better than we can of the value of their evidence. The learned judge found that what the plaintiff had said of the defendant was just as bad as what the defendant had said of the plaintiff; and he found also that the only witness who spoke about the slanderous words alleged to have been used by the defendant about the plaintiff's wife was not sufficiently reliable to base a judgment for damages upon his testimony.

It is evident that the parties had been at enmity with each other for some time, and one called the other a "canaille," while the other had just recently said of him that he could have sent him to jail if he had chosen.

Then, as to what was said or alleged to have been said by the defendant about the plaintiff's wife, it certainly was defamatory if satisfactorily proved. But can we say that it is satisfactorily proved by this one witness who swears it was said to him alone, and that he repeated it to the plaintiff? At best that would be the act of a mischief-maker, and quite as despicable as the slander itself, if ever it was uttered: but this man is besides very seriously contradicted and impaired by the evidence of Dumesnil. On the whole I should not hesitate to confirm the judgment which, I think, very properly dismissed the action.

Judgment confirmed.

Augé & Co. for plaintiff.

St. Pierre & Co. for defendant.

THE LATE MR. JUSTICE DAY.

At the Convocation of McGill University, held March 29, Mr. Justice Mackay delivered the following address concerning the late Chancellor of the University, Hon. C. D. Day :

Since we last met in Convocation a great loss has fallen upon the University by the death of our late Chancellor, the Honourable Mr. Justice Charles Dewey Day. He was its first Chancellor under the amended statutes of 1864, and for 32 years was president of the Royal Institution for the Advancement of Learning. He continued actively to discharge the duties of those offices until his death, which occurred in England in January last. He had in his lifetime filled several positions of honour in this province; he was solicitor-general, and one of the chiefs practising at the bar of this city when in 1842 he was offered and accepted a seat in the Queen's Bench, which he continued to fulfil the duties of until 1857, when he was appointed (we may truly say by reason of his fitness) one of the commissioners to codify the laws of Lower Canada. As a judge the deceased was remarked for his practical energy, his great talent for despatch of business, and for analysis, his soundness of judgment, and his impartiality. He frequently presided at jury trials, which in his time seem to have been resorted to more frequently than nowadays; his charges to juries, and these are things that sometimes try judges, were remarkably practical, lucid, sound and judicial. In 1864, upon the completion of the codes, which will ever remain a monument of his and his colleagues' industry and learning, Judge Day retired from the bench; but he never ceased to interest himself in the affairs of this University whose growth and progress, from very small beginning, he was witness of and powerfully contributed to. When he took office the students in arts numbered three, in the law faculty four and in medicine fifty-three. In 1883 the students in arts numbered: undergraduates 99, partial and occasional 58—in all 157. The students in law numbered 26, in medicine 204, and the school of applied science was working with students, undergraduates 55, partial and occasional 14—together 69. In 1881, when the financial condition of the University was discouraging, the late chancellor, assisted by our worthy principal, prepared a statement of its affairs, accompanied by an appeal to the public for aid. This he supported by an elo-

quent speech at a public meeting. The result, as you know, was encouraging, friends of the University seemed to be raised up, liberal donations were made to it and it was relieved from its embarrassment. After the first meeting of the governors, after the melancholy news of Judge Day's death reaching us, it was resolved:

"That the governors of McGill College deeply lament the irreparable loss which this University has sustained in the death of their late colleague, the Hon. Charles Dewey Day, for 32 years the president of the Royal Institution for Advancement of Learning and first chancellor under the amended statutes of 1864, and one of the earliest and most valuable members of this board.

"The history of the University is intimately bound up with the long course of his administration, and its progress and prosperity in a great measure are due to his eminent ability and the wise counsels that have at all times been rendered by him to promote its interests and welfare.

"The governors desire to record the high appreciation and esteem they feel for the great worth of his private and public character, the memory of which will be ardently cherished with reverence and affection by those whose privilege it has been to be personally and officially connected with him."

And at the meeting of the corporation of the University, held yesterday, a resolution of like substance was unanimously agreed to. The resolutions referred to free me, in a degree, from saying some other things that I might have said. I am confident that they will be approved by each and every person present in this hall and by all who take interest in the affairs of the University, as a true and just tribute to the memory of an old and faithful servant of it, a worthy man, the blank left by whose decease it will be very difficult to fill up.

RECENT ENGLISH DECISIONS.

Copyright—Author of photograph.—A person who is merely the proprietor of a photographic establishment, and who employs a staff of servants (paying them wages or salaries) for the purpose of taking photographs, and provides the materials for taking and making them, is not the author or joint-author with his servants, of any photograph so taken and made by any one or more of them, within section 1 of the Copyright Act of 1862. Decision of Field, J., affirmed. The author of a photograph is the person who most effectively contributed to the result, that is the person who directed his mind toward and superintended the particular arrangements which have actually resulted in the formation of the picture; and who that person is, is a question of fact in each particular case. Ct. of App., August 2, 1883. *Nottage v. Jackson*. Opinion by Brett, M. R., and Cotton and Brown, L. JJ. (49 L. T. Rep. [N. S.] 339).

The Legal News.

VOL. VII. APRIL 12, 1884. No. 15.

MEDIEVAL LAW SUITS.

The writer of an article entitled "Daily Life in a Mediæval Monastery," which appeared in *Nineteenth Century*, furnishes an interesting account of the occupations and amusements which filled up the daily round of monks in the olden time. Among these diversions litigation played an important part. We condense a portion of the article:

"In the natural course of events, as a monastery grew in wealth and importance, there was one element of interest which added great zest to the conventual life, in the *quarrels* that were sure to arise.

"First and foremost, the most desirable person to quarrel with was a bishop. In its original idea, a monastery was not necessarily an ecclesiastical institution. It was not necessary that an abbot should be an ecclesiastic, and not essentially necessary that any one of his monks should be in holy orders. Long before the thirteenth century, however, a monk was almost invariably ordained, and being an ordained person, and having his local habitation in a bishop's diocese, it was only natural that the bishop should claim jurisdiction over him and over the church in which he and the fraternity ministered; but to allow a power of visitation to any one outside the close corporation of the convent was fraught with infinite peril to the community. To have a querulous or inquisitive or even hostile bishop coming and intruding into their secrets, blurring them out to the world and actually pronouncing sentence upon them, seemed to the monks an absolutely intolerable condition of things. Hence it seemed supremely desirable to a convent to get for itself the exemption of their house from episcopal visitation or control. Such attempts were stoutly resisted by the bishops, and, of course, bishop and abbey went to law. Going to law in this case meant usually, first, a certain amount of preliminary litigation before the Archbishop of

Canterbury; but sooner or later it was sure to end in an appeal to the Pope's court, or, as the phrase was, an appeal to Rome. * * *

"When there was no appeal case going on—and they were too expensive an amusement to be indulged in often—there was always a good deal of exciting litigation to keep up the interest of the convent, and to give them something to think about and gossip about nearer home. We have the best authority—the authority of the great Pope Innocent III.—for believing that Englishmen in the thirteenth century were extremely fond of beer; but there was something else that they were even fonder of, and that was law. Monastic history is almost made up of the stories of this everlasting litigation. Nothing was too trifling to be made into an occasion for a lawsuit. Some neighbouring landowner had committed a trespass or withheld a tithe pig. Some audacious townsman had claimed the right of catching eels in a pond. Some brawling knight pretended that he was in some sense *patron* of a cell, and demanded a trumpety allowance of bread and ale, or an equivalent. As we read about these things we exclaim, 'why in the world did they make such a fuss about a trifle.' Not so, thought the monks. They knew well enough what the thin end of the wedge meant; and, being in a far better position than we are to judge of the significance and importance of many a *casus belli* which now seems but trivial, they never dreamed of giving an inch for the other side to take an ell. So they went to law, and enjoyed it amazingly."

FIGURES FROM THE CENSUS.

The census statistics of Canada, which have just appeared, give the number of advocates in 1881 at 2,717, against 2,212 in 1871. It appears, therefore, that there is one advocate for every 1,584 of population. This proportion is not nearly so considerable as in the case of the other learned professions, the number of physicians being 3,507 in the year 1881 against 2,792 in 1871; while of clergymen there were 6,329 in 1881 against only 4,436 in 1871. This is exclusive of 491 Christian Brothers who have more than doubled in the decade, there

being only 205 in 1871. The "nuns" also exhibit a remarkable increase, the number being 5,139 in 1881 against 2,907 in 1871. While the increase in these sacred vocations has been, so to speak, by leaps and bounds, we nevertheless required 1,313 policemen in 1881 against 446 in 1871. The band of teachers exhibits a normal and satisfactory increase from 13,400 in 1871 to 19,232 in 1881. We are not concerned about other figures of the tome which, somewhat tardily, makes its appearance three years after date. We only note that the hackneyed jokes at the expense of the plumber, far from deterring the rising generation from turning their attention to that lucrative occupation, have almost trebled the numbers within its fold, there being 1,307 in 1881 against 526 in 1871.

McLAREN v. CALDWELL.

The cable despatches from England state that the judgment of the Supreme Court of Canada in this case, 5 Legal News, 393, has been reversed by the Judicial Committee of the Privy Council. The precise grounds of their Lordships' decision cannot yet be safely stated, but we propose to publish the text of the judgment as soon as a copy reaches this side.

NOTES OF CASES.

COUR DU BANC DE LA REINE.

MONTRÉAL, 22 mars 1884.

DORION, J.C., RAMSAY, TESSIER, CROSS, BABY, J.J.

NADÉAU v. CHEVAL dit St. JACQUES.

Jugement interlocutoire—Requête d'Appel.

JUGE : *Que ce ne sont pas les considérants ou motifs, mais le jugé ou dispositif, qui rendent un jugement interlocutoire sujet à appel.*

Le défendeur demandait à appeler d'un jugement interlocutoire, rendu par la Cour Supérieure de Richelieu, dans une action en bornage, ordonnant la confection d'un plan des lieux indiquant les prétentions respectives des parties, par un ou des arpenteurs à être nommés par les parties ou d'office par la cour, etc. Le requérant avait contesté la demande en plaidant qu'il avait déjà borné

avec le demandeur, et en produisant un procès-verbal de bornage par un arpenteur, accepté et signé des deux parties. Il fondait sa requête d'appel sur le fait que le jugement interlocutoire, en affirmant dans les considérants ou motifs qu'il y a lieu d'ordonner le bornage, et que l'action du demandeur est bien fondée pour compléter le bornage déjà fait (chose non demandée par l'action), décidait virtuellement du litige entre les parties.

L'HON. JUGE-EN-CHEF, en prononçant le jugement de la cour, dit que cette raison n'était pas suffisante pour autoriser l'appel demandé ; que la cour inférieure, en ordonnant la confection d'un plan des lieux par un arpenteur, n'a de fait rien décidé quant au mérite du litige, excepté par les motifs de son jugement ; mais que les motifs ne sont pas le jugé ; que le jugement n'est en réalité qu'un jugement préparatoire ; que si la défense du requérant est bien fondée, ou les conclusions de l'action insuffisantes (questions sur lesquelles cette cour n'exprime cependant aucune opinion), la cour inférieure pourra encore en tenir compte et y remédier par son jugement final, en mettant les frais à la charge du demandeur ; sous ces circonstances l'appel serait prématuré, et la requête est renvoyée.

J. B. Brousseau, proc. du requérant.

A. Germain, proc. de l'intimé.

(J. B. B.)

SUPERIOR COURT.

MONTRÉAL, February 1, 1884.

Before JOHNSON, J.

STEPHENS v. THE CITY OF MONTREAL, & THE MONTREAL GAS CO., mis en cause.

Injunction against signing contract—Procedure.

On an application by a ratepayer for a provisional injunction to prevent the Corporation of Montreal and its officers from completing a contract with a gas company, which had been authorized by a resolution of the City Council : Held, (1) that the order asked for would be useless, as the signatures of the Mayor and City Clerk to the writing evidencing the contract would not affect the rights of the parties, the illegality alleged,

if it existed, being as effectual against the contract when signed as before. (2) The alleged monopoly was not such in the sense of the law, consumers having the option to take gas or not.

semble, that an action of this nature should be instituted in the name of the Attorney-General.

JOHNSON, J. The plaintiff in this case wants a provisional injunction to prevent the corporation and its officers from making or completing a contract with the *mis en cause*. The petition and the action are identical in terms, except the conclusions which, in the petition are restricted to a temporary order during the suit, and in the declaration ask for a permanent injunction to restrain the defendant from making the contract with the Gas Company. So the shortest way to deal with the matter will be to refer at once to the petition itself, which sets out at length both the contract itself, and the petitioner's pretensions. The material parts are:

1st. That by a resolution of the Council of the City of Montreal, passed at a Session of the said Council regularly and legally held on the 27th of December, 1883, the said Council acting for and representing the said Corporation, the defendant herein, it was, among other things, resolved that the said Corporation defendant do enter into a certain agreement or contract with the New City Gas Company of Montreal (to wit, a certain Corporation formerly known as the New City Gas Company of Montreal, the name whereof, by Statute of the Province of Quebec, 42 & 43 Vict., c. 81, was changed to the Montreal Gas Company), and which agreement and contract is in the following words, to wit, namely: "Agreement between 'The City of Montreal' and 'The New City Gas Company of Montreal' for lighting the City with gas.

The contract itself is then set out as follows:—

"On this — day of the month — in the year of our Lord 1884.

"Before Mr. François Joseph Durand, the undersigned notary public for the Province of Quebec, one of the Provinces of the Dominion of Canada, residing in the City

of Montreal, in the District of Montreal, in the said Province, appeared, 'The City of Montreal,' a body politic, duly incorporated by legislative enactments, having their office or place of business at the City Hall, in the East Ward of the said City of Montreal, herein represented and acting by the Mayor of the said City, the Honorable Jean Louis Beaudry, one of the Legislative Councillors of the said Province, residing in the said City of Montreal, parties hereto of the first part, and the 'New City Gas Company of Montreal,' a body duly incorporated in virtue of legislative enactments, having their office and principal place of business in the said City of Montreal, herein represented and acting by Jesse Joseph, of the said City of Montreal, Esquire, the president of the said Company, and by — of the same place, both hereto present in their said quality, and as such duly authorized for the purposes hereof, under and by virtue of a resolution of the Directors of the said Company adopted at a meeting held on the —, a copy of which resolution shall remain hereunto annexed after having been signed by the said notary *ne varietur*, parties hereto of the second part, which said parties hereto have made and entered into the following agreement between themselves, to wit: 'The New City Gas Company of Montreal' do hereby bind and oblige themselves to supply and furnish all the gas consumers within the limits of the said city of Montreal with gas, which shall be 'coal gas,' manufactured solely from bituminous coal, and of an illuminative power of not less than sixteen candles, at a price which shall not exceed the price of one dollar and fifty cents net per each thousand cubic feet generally furnished and supplied by the said company from the first of May, 1885, to the first day of May, 1890, and of \$1.40 for the next five years, that is to say, from the first day of May, 1890, to the first day of May, 1895, provided, however, that no extraordinary circumstances should arise during the existence of the present contract or agreement, such as a war, the destruction of the works, a general strike, or any other event constituting a *force majeure* (*vis major*).

"2nd. The said company shall during the said period of ten years, supply and furnish gas for cooking and heating to all consumers of the same within the limits of the said City, at a price not to exceed one dollar per each thousand cubic feet."

"3rd. The said Company shall light the city every night in the year without exception during the said ten years, at a price not to exceed twenty dollars a year, payable quarterly, for each lamp put up and required by the city in every street, lane, square or avenue. The time for keeping the lamps lighted, and which is mentioned in the specification hereinafter mentioned, shall take effect immediately, and from this date without any extra charge by the company."

"4th. The said Company shall be bound to lay pipes in all the streets of the city as they shall be directed by the Light Committee of the said City of Montreal, provided that the distance between the lamps do not exceed two hundred feet, and that there be at least two consumers of gas between every two lamps, or, in default of two consumers, that the distance between lamps shall not exceed one hundred and fifty feet."

"5th. The said Company shall be obliged to lay their pipes and furnish gas in adjoining municipalities when annexed to the said city at the same prices and conditions as herein stipulated."

"6th. And the City of Montreal aforesaid during the said ten years, that is to say, from the first day of May, 1885, to the first day of May, 1895, shall not grant to any other company or parties the leave to lay gas pipes in the streets or roadways of the said City of Montreal, except during the last two years of the present contract or agreement, when the said City of Montreal shall have the right to authorize any other company that may be formed or then exist, or any other parties, to lay gas pipes and erect works, so as to be ready to undertake the contract on the first day of May, 1895, for the lighting of the city and supplying gas to the citizens if necessary."

"7th. It is specially agreed between the said parties hereto that the said Company shall in the future, as they have done before, collect and receive the several amounts of money at

any time due them by the gas consumers, from these latter only, without any recourse whatever against 'The City of Montreal' aforesaid, which shall be liable to pay only the amounts to become due for street lamps and gas furnished to and for the use of buildings possessed by the said City."

"8th. The said City of Montreal shall have the right to provide for the inspection of the gas and meters furnished by the said Company, and to that end to appoint an inspector who shall be charged with regulating the pressure of gas."

"9th. The City of Montreal aforesaid shall also have the right to provide for the general or partial lighting of the streets and squares of the said City by electricity, and to that end to revoke the present contract for gas lamps in such districts as the Council may determine, without the said company having any right or ground for claiming damages."

"10th. It is also stipulated that the citizens of the said city of Montreal shall have the right of purchasing and using their own gas meters."

"11th. The said parties agree to execute the present contract according to the specifications contained in the form of contract hereunto annexed and signed by the parties hereto, and the undersigned notary *ne varietur*."

"12th. All the clauses, conditions, explanations, directions and instructions contained in the hereto annexed specification shall be strictly followed, although not herein repeated for brevity sake. In case however there should be any difference between the meaning of these presents, and any part of the said specifications, the meaning of these presents shall be followed."

"13th. These presents have been passed and executed on the part of the City of Montreal in conformity with resolutions of the City Council, adopted at their meetings held on the twenty-seventh day of December last (1883) amending and adopting as amended a report of the 'Light Committee' of the City Council of the sixth day of November last, copies of which resolutions and report shall remain hereunto annexed, signed by the undersigned notary, *ne varietur*."

"14th. The said Company shall pay the

cost of the present contract and of a certified copy thereof for the said city. Thus done and passed at the said City of Montreal, on the day, month and year hereinabove first written, under the number ten thousand — hundred and — of the repertory of the notarial deeds of Mr. F. J. Durand, the undersigned notary. And these presents having been first duly read to the said parties hereto, the said Mayor of 'The City of Montreal' has signed, and the City Clerk, to wit, Charles Glackmeyer, Esquire, residing in the said city, has countersigned, and has affixed the seal of the corporation of 'The City of Montreal,' and the representatives of the said Company have signed in presence of the said notary, who has also signed."

The petition then alleges certain particulars in which the plaintiff contends that the powers of the corporation have been exceeded in this transaction, and proceeds to argue what would be the results of the contract; and to deduce certain legal consequences such as the establishment of a monopoly contrary to law and public policy, and the assumption of the right to stipulate a price to be paid by gas consumers. I will not, however, mention these points any further just now, because this part of the statement of the plaintiff's case is immediately followed by an averment of great importance which may perhaps dispense with any notice of those points at all.

This averment is in these words :

"That the said council, for and on behalf of the said City of Montreal, did, on the 14th of January, 1884, pass a resolution authorizing and requiring the Mayor and City Clerk of the said City to sign and execute the said above proposed contract for and on behalf of the said defendant, respondent.

Now, I say this discloses a very important fact indeed.

The resolution here referred to is in these terms :

Moved by Alderman Beausoleil, seconded by Alderman Rainville,

"That the deed or contract between the City and the Montreal Gas Company as prepared by the City Notary, and now submitted to this Council, be approved and ratified, and

that his Worship the Mayor be authorized to append his signature thereto."

This taken with the written admission of the parties, that it was "adopted and carried, and that the contract set out in the petition is the contract referred to, and approved and confirmed by the said resolution of the City Council petitioner, and submitted to the Mayor of Montreal for his signature," affords complete proof of three things : 1st, that on the 27th of December the corporation agreed to a contract with the Gas Company, the party now here, which was the same contract as that set out in the petition ; 2ndly, that that contract was reduced to writing by the City Notary ; and 3rdly, that after all this had been done, after the agreement had been not only made between the parties, but reduced to writing, it was approved and ratified and confirmed. One can only approve and ratify something that has been done. So much therefore had been done, viz. : the agreement or contract of itself had been assented to on both sides ; its terms were so well known and understood, that they were confirmed ; the writing witnessing those terms was drawn, and all that remained was matter of form—a signature—the contract itself being, of course, entirely complete by the assent of the parties alone—without any writing to witness it, and without the signature of either party. I say as a matter of law the contract was not only complete ; but it appears to have been made and even modified with deliberation before it was completed, for we see, from clause 13 of the contract, and from a certificate of proceedings of council filed in the case, that there was an amendment to the resolution of the council of the 27th December. Therefore there are here all the constituents of a complete contract. Under Art. 984 of the C. C., there are only four requisites to the validity of a contract ; the capacity of the parties—their consent—the subject of the contract, and a consideration ; and under article 1025, C. C., the consent alone of the parties is sufficient to complete contracts except those concerning the transfer of ships.

But whatever the state of the matter may be : whether it is a complete contract or not, let us look at it merely as far as it has gone

and consider it in the somewhat hazy light in which the plaintiff presents it; whatever it is,—a contract, or a mere attempt at a contract, the plaintiff wants to prevent its going any farther because it is illegal. These illegalities need not be enlarged on at this moment; but granting them all for the sake of testing the plaintiff's position, what does that position amount to? Simply to this:—that the corporation must be stopped because what it is doing or trying to do is illegal. Now it was pointed out by the Court very early in the argument, and assented to on both sides, that this illegality must be shown. It must be seen that the city is going beyond its powers. It won't do to say that being within its powers, it is exercising them in a way more or less beneficial or prejudicial to this one or to that one. Now put it in any way you like:—these proceedings of the corporation, whatever their nature—whether a contract or an attempt at a contract—must be either the one thing or the other:—what is done or contemplated (whichever you please) must either be illegal or not. If not, the plaintiff has no case; if on the other hand, it is all illegal, an interim order would be utterly useless, for whether you take the contract as complete now (which is the view of it I incline to) or whether it will only be completed by the signature of the mayor, can make no difference. In either case the whole thing would be contrary to law, and the action would be maintained finally and absolutely whether there was an interim order or not. They either have the power or they have not. If they have the power it is useless to ask to stop them in the exercise of it: if they have not the power, the signing won't mend the matter, for it is surely not by affixing a signature to an illegal contract that it can be made a good one.

I might properly stop here, and refuse to grant the order that is asked for, and decline to go farther, or notice the particular points in which the illegality is said to consist—since it is clear that illegal or not—the order would be entirely useless; but I have a great respect for arguments ably and honestly used, as I am sure they have been used in this case—as well as with marked ability—by both of the learned coun-

sel who urged the plaintiff's rights. I will only say that these points are two in number—the point of monopoly, and the point of power to fix the price of gas to the consumer. It is easy to show that neither in point of law nor in point of fact has either of these arguments anything in it. Monopoly as a legal term—a thing proscribed by law—which the crown can't give a right to, is a very different thing from the monopoly of common talk. Monopoly of course there is in the loose and popular sense; and so there would be in contracting as they have done for eight years without interruption by others—or for four years or four months; but it is not monopoly in law—there is neither perpetuity nor legislation as the authorities require; it is not monopoly in the language of the law, but in the language of the streets. So, too, as to fixing the price of gas to the consumer: they do nothing of the kind. They stipulate for the city generally:—and there is all the difference in the world between allowing a Gas Company to lay down pipes, and make gas to fill them which people may use or not as they please, at a price to be agreed between the maker and the consumer, and in doing this stipulating that there is to be a limit to the charge,—I say there is all the difference possible between this—which is what has been done here—and agreeing or assuming to agree for the consumer to any fixed price, or any price at all; the whole thing being left to the consumer's option whether he will have it or not. And here I ought to notice what I consider the principal fallacy underlying the plaintiff's pretensions. I have said there has been no legislation. I mean of course municipal legislation, by-laws, conferring what is called an exclusive right. I say now that the fallacy at the bottom of the plaintiff's pretensions appears to me to be that he has assumed the powers exercised by the corporation to be powers under the 65th sub-section of section 123 of the Act 37 Vict., c. 51, which gives power to make by-laws for lighting the city or any part thereof by gas or otherwise. Here there has been no by-law, and that is not the power that has been used at all. The power used here is the power given under sec. 1, which gives

the corporation the most ample powers to contract, and sue and be sued, which the Civil Code gives them also. It is not a law they have passed to give a monopoly, it is a bargain they have made with another; and by law (see art. 1023 C. C.) contracts affect only the parties to them: they cannot affect the rights of others. The corporation have agreed with this company that for 8 years no one else shall put down pipes in the streets. Does any one imagine that another company would be stopped by that, if they had a right by their charter to do it? The only effect of violating the stipulation made between the city and the company in that case would be that the former would be liable in damages to the latter; and to resort to the argument, if it can be called argument, that the corporation would probably refuse the permission which the statute requires in such cases, is to ignore the power of the law to compel them.

I decline to notice the effect of the present contract which it is here sought to defeat. It is said to be far better for the city than the former one, and it is, as far as I can see, far better in many respects—for both contracts are before me, and I cannot fail to see the difference, and the improvement—but all this has really nothing to do with the legal question, which is, not whether the city has made a good bargain or a bad bargain—but whether it has made an illegal bargain. I think it will be conceded, upon reflection, by the learned gentlemen who so ably put the plaintiff's case before the Court, that in the eye of the law there is no illegality in this transaction. That even if there is, an interim order would be useless. That there is no monopoly in the legal sense of the word, and no excess of power.

Occupied up to late yesterday afternoon in the Court of Review, I could only look at this case very late last night, and I thought that the above considerations would be sufficient to dispose of it. This morning, however, I have found time to look further into it, and I would draw the attention of the parties to the nature of this proceeding. Does not the Art. 997, as modified by Art. 1016 of the C. of P. apply to this case? Can a private individual take this proceeding at all? In the

case of *Molson v. The Mayor*, etc., decided by me in June, 1873, it was held that the action, which was analogous to this, must be brought by the Attorney-General, and that decision was confirmed in appeal. However, I only throw out this for the consideration of the parties, as the point not having been raised, has, of course, not been discussed, and therefore cannot be decided now.

Again, as regards the point of "monopoly" which is a taking word, and might easily frighten the uninformed, I find on looking at English gas company statutes that they often exclude other companies from competition; the object being well understood to be the prevention of coalitions, and arbitrary prices, or what would be quite as bad, the deterioration of quality in the gas supplied.

I have given this case all the attention in my power, and I am of opinion that the signing the writing evidencing this contract would not change the position of the parties; that if there is illegality, it is illegality which will be as effectual against the contract when it is put on paper and has a seal or a signature attached, as it would be without the ink or the sealing wax. I have serious doubts whether the only recourse, if the thing is illegal, would not be by action in the name of the Attorney-General; and on the main points of such illegality as have been suggested—on the point of monopoly, and the point of invasion of the right of private contract, I am against the petitioner's facts and conclusions of fact.

Therefore the order asked for is refused, and the petition dismissed with costs.

Greenshields & Co., for the plaintiff.

R. Roy, Q.C., for the city.

Lacoste & Co., for the *mis en cause*.

COURT OF REVIEW.

MONTREAL, Jan. 31, 1884.

Before JOHNSON, DOHERTY & JETTE, JJ.

STE. MARIE V. ATKIN et vir, and McDougall et vir, opposant.

Judicial sale—Possession.

Effects purchased bona fide at a judicial sale, and left in the possession of the defendant by the purchaser or his transferee, may be claimed by the owner and the sale thereof prevented, if such effects are seized at the suit of another creditor of the defendant.

The inscription was by the plaintiff contesting, on a judgment of the Superior Court, Montreal, Papineau, J., Nov. 30, 1883.

JOHNSON, J. The effects seized in this case are claimed by the opposant as her own, under a sale of them to her by one Hearle. The contestation is not so much directed against the opposant's title as against that of Hearle, who acquired these things at a sheriff's sale. The judgment held the opposant's title good; and there is nothing to show the contrary. Hearle may have acquired them to protect the defendant; but there is nothing illegal in that, taken by itself, and considered apart from any fraud or simulation in the circumstances of the sale. Hearle is not a party in the case, and there is no sufficient proof of any fraud, even if he were here and able to defend himself. As to the sale from Hearle to the opposant there is nothing shown against it: and the judgment which maintained the opposition and dismissed the contestation must be confirmed. The case of *Senécal & Crawford*, 2 Dec. Cour d'Appel, p. 121, is in point.

Judgment confirmed.

Cooke & Co. for opposant.

Ethier & Co. for plaintiff contesting.

COUR SUPERIEURE.

[En Chambre.]

MONTREAL, 16 février 1884.

Coram MATHIEU, J.

Ex parte DME G. DELISLE, requérante.

Femme mariée—Tutelle.

JUGE: *Que dans certains cas spéciaux la femme même du vivant de son mari peut être nommée tutrice à son enfant mineur.*

La requérante avait obtenu contre son mari un jugement en séparation de corps. Ce dernier qui était tuteur aux biens à son enfant mineur, renonça par acte authentique à la tutelle de son enfant pour des raisons qu'il déclara ne pas vouloir faire connaître. Le conseil de famille ayant alors été assemblé, à la demande de la requérante, nomma la mère tutrice.

Le protonotaire refusa de confirmer cette nomination, sur le principe que la femme

nonobstant la séparation de corps était encore sous puissance de mari et ne pouvait pas être nommée tutrice.

La requérante maintint devant le juge qu'une femme peut même du vivant de son mari être nommée tutrice à son enfant mineur lorsque son mari ne peut pas, ne veut pas, ou est indigne d'exercer la puissance paternelle. Autorités de la requérante: 1 Aubry & Rau, p. 366, § 87 et page 502; 6 Aubry & Rau, p. 77, § 550; 2 Demolombe, No. 317; 6 Demolombe, Nos. 449, 450; Auzanet, arrêts du Parlement de Paris, Liv. I, ch. 55, page 72.

L'HONORABLE JUGE homologua sans considérants l'avis du conseil de famille, et nomma la requérante tutrice aux biens de son enfant mineur.

Barnard, Beauchamp & Barnard, avocats de la requérante.

(J.J.B.)

GENERAL NOTES.

Some interesting statistics are furnished in the half-yearly report of Judge Ardagh respecting the County Courts of the Eastern Judicial District of Manitoba. It comprises seven divisions, in which eighteen sittings were held. During the half year ending December 31st 2,757 suits were entered, the amount claimed being \$139,211. The amount collected to date was \$30,880, a very large portion of the balance having been settled out of court. The number of judgment summons issued was 440, of which 21 orders for commitment were entered, only one of which was put in force, and that for a few hours only. The number of miles travelled by the judge in order to hold these courts is over 5,000 in the year; 3,800 by rail and 1,200 by driving.

THE LATE MR. J. W. MERRY.—We have been requested to publish the following resolutions:—At a meeting of the St. Francis Bar, held on the 5th inst. at Sherbrooke, were present, Wm. White, Esq., Q.C., Batonnier, His Honor Mr. Justice Brooks, Judge Rioux, Messrs. J. L. Terrill, L. C. Belanger, L. E. Panneton, H. B. Brown, J. A. Camirand, A. S. Hurd, E. C. Hale, S. B. Sanborn, C. W. Cate, E. Chartier, H. D. Lawrence, F. Campbell, G. De Lottinville, H. R. Fraser, D. C. Robertson, and H. W. Mulvena. It was moved by H. W. Brown, Esq., and seconded by Jos. L. Terrill, Esq., 1. That the members of the Bar, section of St. Francis, have learned with deep regret of the death of their friend and confrère, John W. Merry, whose sterling qualities of mind and heart had gained for him a foremost place in their esteem and regard, and they desire to tender to his bereaved widow and family their respectful sympathy in the great loss they have sustained. 2. That the members of this section do attend his funeral in a body on Tuesday next, and wear mourning for one month.

The Legal News.

VOL. VII. APRIL 19, 1884. No. 16.

HODGE v. THE QUEEN—OPINION IN ENGLAND.

The *Law Journal* (London), in its issue of March 29, refers to the judgment of the Judicial Committee in this case, which was criticised by "R." (7 L. N. 49), and appears to entertain the same doubts as to the correctness of the opinion expressed by their lordships on the question of "imprisonment" including imprisonment with hard labour. The observations of the *Law Journal* are as follows:—

"Criticisms on the decisions of a Court of final appeal are mainly of value for the purpose of bringing home to the appeal judges the remembrance of the fact that they are subject to criticism. We confess that the observations made in Canada on a part of the decision in *Hodge v. Reginam*, 53 Law J. Rep. P. C. 1 (to appear in the April number) are not without weight. It is held by the Judicial Committee of the Privy Council that under the words 'punishment by fine, penalty or imprisonment' in section 92 of the British North America Act, 1867 (30 Vict. c. 3), the provincial legislatures of the Dominion of Canada have power to impose imprisonment with hard labour. By a well-known rule of construction, the word 'penalty' cannot include a particular form of imprisonment, because imprisonment is expressly mentioned. The word 'imprisonment,' therefore, is held to include imprisonment with hard labour; does it also include imprisonment with solitary confinement? The learned lords say that hard labour is generally incident to imprisonment; but ought it to be assumed that an Act of Parliament which creates a constitution and begins upon a *tabula rasa*, intends one form of punishment to be included in another because they are often in other laws and other constitutions associated together? The judgment was delivered by Sir Barnes Peacock, and so has perhaps the weight of his high authority. How many of

the lords differed from the opinion given to the Crown it is impossible to say. From the peculiar practice of the Judicial Committee in giving judgment, the weight of their decisions on professional opinion is dissipated. To give to the world a decision of the majority of five lawyers is to give a decision which has the authority of not even one of them."

LIBERTY OF THE PRESS ABUSED.

The writer of an article in a recent issue of the *Manhattan* laments the degeneration of the great journals of New York within the past twelve or fifteen years. Newspapers give less attention than formerly to topics legislative, educational and scientific, and feed their readers on the unwholesome diet of sensationalism—divorces, the phases of illicit love, and similar scandals. This is not a healthy symptom of the times, and Mr. Smalley, the writer referred to, will have the sympathy of every right-thinking person in the protest which he makes against this abuse of a noble profession. Unfortunately, it is not confined to one city, nor to the American continent. The same spirit is prevalent in England, where journals mushroom-like are springing up and sustaining a feverish existence by the total disregard of the decencies of life. The columns of rubbish published lately about a breach of promise case, apparently because the defendant is the son of an ex-Lord Chancellor, afford one illustration. Another remarkable instance is the recent publication, in a journal like the *Pall Mall Gazette*, of the story that Lord Coleridge had made an offer of marriage to Miss Mary Anderson, the actress. Surely the editors of the *Pall Mall Gazette* were perfectly aware that this was a pure fabrication, without a semblance of plausibility to take it out of the mess of inane clatter which daily finds its way into print. Miss Anderson has publicly expressed her pain at the report, as well as her indignation that statements of this description should be disseminated without inquiry. Lord Coleridge also has deemed it to be his duty to meet the rumor by a flat contradiction, which he does in these terms, in a letter addressed to the editor of the *Pall Mall Gazette* :

"It would be affectation to doubt that the paragraph headed 'The Judge and the Actress' in your paper this evening refers to me. I desire, in the fewest possible words, to state that I never had the pleasure of seeing Miss Anderson in my life, either in public or private, and that I never wrote a line to her. The whole matter is an absolute and impudent falsification."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, JAN. 31, 1884.

Before JOHNSON, J.

RIVER V. THE CITY OF MONTREAL.

City of Montreal—Assessment for cost of improvement—Petition to annul special assessment roll.

Commissioners acting under the 42 & 43 Vict., c. 53, regulating proceedings for the preparation of special assessment rolls for improvements in the City of Montreal, are not authorized to go beyond the terms of the resolution of Council settling the proportion of cost to be levied on the proprietors benefited. And where an action was brought to annul a special assessment roll, without attacking the resolution under which it was prepared, the Court held that the question, whether the city had power to limit its share to one-third of the cost of the improvement, was not put in issue, and could not form the subject of inquiry.

JOHNSON, J. This is an action brought in the form of a Petition by a municipal elector to annul a special assessment roll made by commissioners acting in virtue of a resolution of the corporation, for the purpose of a local improvement, and under an appointment for that purpose made by the Court of Review.

The right to petition is based on sec. 12 of 42 & 43 Vic., c. 53, which is as follows:—"Any municipal elector, in his own name, may, by a petition presented to the Superior Court sitting in Montreal, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment, with costs against the corporation."

The 4th section of the same statute, after reciting certain previous and abortive assessments, authorized other and new assessment rolls to be made, and also the appointment by the Court of Review of three commissioners for that purpose; and by the fourth clause of that section it was enacted what the powers and duties of the commissioners should be, and certain other provisions of a previous statute, (37 V. c. 51) were referred to as governing their proceedings. As to their office, and the nature and extent of their duties as commissioners, the fourth section said: "It shall be the duty of the said commissioners to commence their proceedings on the day fixed by the judgment appointing them, and to assess and apportion the cost of the improvement in whole or in part, as the case may be, according to benefit and in such manner as to them may appear most reasonable and just, upon all and every the pieces or parcels of land or real estate which they may determine to have been benefited." In May, 1880, the commissioners were appointed by the Court of Review; and that Court appears, by its judgment on that occasion, to have held that whatever difficulties might arise thereafter, when the commissioners should have terminated their proceedings, there was, at all events, no difficulty then in the way of appointing them. The difficulties or some of the difficulties which seem to have been then anticipated are now said to have arisen, and the assessment the commissioners have made is arraigned on a variety of grounds—some of which I will not dwell upon further than to say that they are of a most extensive and sweeping character, and directly include in one vast conspiracy both the legislature and the corporation, as well as their individual members. Coming down, however, to more tangible grounds of complaint, I understand the main pretension of the Petitioner to be that this last assessment roll made by the three commissioners appointed by the Court of Review should be set aside, because the commissioners have proceeded upon an entirely erroneous principle in assessing him at \$1,015 for his share of this improvement, whereas he was not benefited to that extent; and that the duty of the commissioners was, under the interpre-

tation of the law advanced by the Petitioner, to have considered the benefit not only to the neighbouring properties, but to the citizens generally; and this view has been enforced with great energy and ability, as well by reference to the law itself, as by reference to the history of the law which is of the most complicated kind; and it was even said by the Petitioners' counsel that the locality of this improvement was very slightly, if at all, benefited, the matter being one which interested the whole city; and that if the commissioners had conceived that they had a real discretion to exercise they would have thrown two-thirds, or three-fourths of the cost upon the city itself, instead of proceeding upon the assumption that two-thirds were to be borne by the parties immediately interested in the neighbourhood of this particular improvement. Now the Court finds itself somewhat embarrassed in this case, which from first to last appears to be one of an extraordinary description. It must be remembered that it is not an action to set aside a by-law, nor yet to set aside a resolution; but only to set aside an assessment roll.

What, if there is no assessment roll produced? Yet assuredly there is none. It was said there were admissions: so there are; but hardly sufficient to cover this. There is no document, and there is no admission showing precisely and entirely what this assessment roll was; and there is nothing either to show exactly what was the resolution of the council, which was the authority for making this assessment. There is verbal and other evidence, no doubt, from which information on these points may be had to a certain extent; but as to this part of the case, the petition itself, even, is deficient and extremely general: it merely says:

"Que la dite cité de Montréal ayant fait amender sa charte par le Parlement de la province de Québec, a fait faire par trois commissaires en expropriation, savoir par MM. Hugh McLennan, G. Pallascio, et Joël Leduc, tous trois de la cité de Montréal, un nouveau rôle de cotisation pour répartir sur les personnes que les dits commissaires jugeraient être intéressées dans la dite amélioration les deux tiers du coût d'icelle, le-

"quel rôle est entré en force le 24 novembre 1881."

In the absence of the roll itself, this part of the petition sufficiently shows that what it required the commissioners to do was to apportion two-thirds of the cost among those benefited. There is no other proof whatever of what the scope of the resolution was, so that whether they acted within their powers, or beyond their powers cannot be determined by the terms of the resolution itself; but it seems to have been taken for granted that the resolution, and the judgment of the Court of Review gave powers in conformity with the law which is to be found in sub-section 4 of the 4th section of the Act of 1879, which I have already recited. Both parties seem to have acquiesced in this mode of proceeding; and the answer of the Corporation to this petition being merely general, a long *enquête* was had, and amongst other things the commissioners themselves were brought up as witnesses, and examined to explain their proceedings. I may say at once that I should be disposed to reject this testimony as inadmissible: but I will not go into that now, because the defendants who objected to it at the *enquête*, do not move to reject it now; and for the further reason that being before me, in the absence of motion to reject, I have read it; and I do not consider that it can affect the case, on the merits one way or the other. The law meant either that the commissioners were to do as they did, or it meant that they were to proceed otherwise, and in the sense contended for by the plaintiff. In the first case there would, of course, be an end of the matter: in the second, their reasons good or bad are of no consequence; it is with their conclusions that we are concerned; and if the law says that they are to do one thing, and they have disregarded it, and have done another thing, there would, of course, be "illegality" under the 12th section of the Act of 1879. So the whole case at the hearing was confined to discussing what were the powers of the Corporation with respect to such expropriations, and how they had been exercised in the present case.

Now, whatever may have been the precise terms of the authority or resolution of coun-

cil, so long as it is not itself attacked, (and I have already observed that the petition does not profess to ask that the resolution may be annulled as illegal), it would seem surely at first sight erroneous and illogical in the highest degree to say that the commissioners in acting under it, and within the limits it prescribed, while it is still in legal force and effect, have acted illegally,—that is as far as their own action is concerned, for the illegality if any, must, in that case, have been in the powers themselves, as well as in the execution of them; and not in the mere exercise of powers either admittedly legal, or what is the same thing practically, left to their legal effect without being called in question.

What the commissioners did appears, as far as it can be collected from the record, to have been this: after their appointment by the Court of Review they advertised in the newspapers, as they were required to do, that they "had been appointed commissioners to assess two-thirds of the cost of the improvement, and that they intended to levy the assessment on a great number of properties which they proceeded to designate, and within the limits which they described; and then they gave notice to all parties interested that they would meet at their room in the City Hall, on Thursday, the fifth of May next, at three o'clock in the afternoon, and would then and there hear any complaint against the proposed limits of assessment." As far as appears no objections were made by any one, and the commissioners went to work to assess two-thirds of the cost, and within those limits, and their right to do so does not appear to have been at that time questioned. Therefore, though I have not the terms of the resolution before me, I see from such evidence as I have that the commissioners made it quite clear that they were going to act as they did, and that nobody was then found who objected to that course; and that it was the right course for them to pursue, if that was what they were required to do by the resolution, and by the judgment of the Court of Review, if neither of those sources of power were called in question in a legal manner. I must assume also that such

really was the course required of them, because the petitioner, though he does not allege it in express terms, in his petition, does allege that that was the precise power which the Corporation assumed to exercise; and because also the learned counsel who argued his case with such consummate skill, distinctly put it upon that ground. He argued against the existence of such a power in the council, and against its exercise by any one acting under their orders, and he assumed that the council had ordered the thing to be done in that way; and I must say I was struck at the time by his argument which was this, (and I take it from his *factum* word for word), "To say that because the council, when ordering the widening of the street, had decided that the city should only pay one-third of the cost, it followed that the city only had been benefited to the extent of one-third, would be to recognize the right of the council to determine who the parties benefited were, whereas the intention of the new law was that the commissioners alone should be invested with that power." Whatever may be the force of that argument which I will come to in a moment, it implies, I think, clearly that that is what the council did, and that they had not the power to do it. As to the argument itself, I must say it appears to me fallacious, because it confounds the power to determine who the parties to be benefited were with the power to fix the extent of the benefit; but it certainly appears to admit that the resolution must have limited the latter to two-thirds, as regards the locality, and one-third as regards the rest of the city. The position of the petitioner therefore must be that the council gave the commissioners this power whether it had it to give or not; and that the commissioners exercised the power within the limits given. But as regards the proceedings of the commissioners themselves, which is all that is attacked by this action, where can it be pretended that the "illegality" of their proceedings is to be found? Yet that is all that the petition asks to annul. On the other hand if it is an 'illegality' resulting from the execution of illegal orders, why are those orders, why is that authority itself, not the subject of the action?

The sec. 12 says any municipal elector may demand the annulment of any by-law, resolution, or assessment roll, etc. The resolution is let alone:—it remains and subsists in full force until annulled by this court which is not asked,—yet, what was done under it, though precisely what it ordered to be done, is said to be illegal. It seems to me that if you do not question the legality of the resolution, you can hardly question the execution of it, unless the execution be at variance with the terms of it—which is not contended. It must be obvious that, if the commissioners had assessed the city for a single dollar more than the one-third it had assumed, they would have exceeded their authority; yet, whether the city had power to limit their share to one-third is not put in question in this case. They are not here called to defend themselves against any charge of illegality in their own proceedings—that is, as far as their resolution is concerned. All that seems admitted virtually to have been legal enough; but when the commissioners come to exercise the powers given to them by the resolution and by the Court of Review, it is not the powers so given that are contested; it is only what they did under those still unquestioned powers. I am not called upon now therefore to consider the right of the Corporation to determine the extent of the benefit. That is not in question in this proceeding. I am asked merely to say there is “illegality” in the proceedings of the commissioners who acted under an authority, whether good or bad—that has not been proceeded against as the 12th section requires, within three months; for the 12th section not only gives the right to set aside a resolution by petitioning this court; but it says that the right to do so must be exercised within three months from the “date of the coming into force of such resolution; and after such delay, every such resolution, etc., shall be considered valid and binding for all legal purposes whatsoever, provided it be within the competence of the said Corporation.” Upon first taking up this case I looked at it, of course, merely as it had been argued—as if it embraced the question of the illegality of the resolution, and as if I had to determine what were the powers of the Corpora-

tion as to widening streets. I confess I was not able to get much light on that question from a reference to the older statutes. I may say, however, that it appeared to me that the law had been greatly changed, and that the Acts of 1874 and 1879 had very materially altered the rights of the corporation in these respects. I formed no final opinion, and I give none, as to those powers, as that question is not before me. The commissioners of course had no authority to act at all except such as was given by the resolution and the terms of their appointment by the court. It may or may not be made to appear very clearly from all these charters, and amendments and consolidations of the statute law what these precise powers are; but one thing seems tolerably plain, that this resolution or authority of council which has been acted on by the Court of Review, and by the Commissioners, is in full force and effect, and cannot now be questioned, and therefore, that to say it was not within the competence of the corporation, while the course pointed out by law for testing that question has been neglected, and to ask me to deal with it incidentally in another manner is to ask me to assume a power which the law does not give. To defeat this assessment upon such grounds would be a course opposed to the object of these enactments which ought to be made to prevail where the improvement and advancement of the interests of the city are what is in view by the legislature. This resolution, though not here to speak for itself, must have been anterior to the judgment of the Court of Review, which is stated to have been in May, 1881. The proceedings of the Commissioners in giving notice, as before adverted to, came afterwards, and then finally the assessment itself which is said to have come into force in November, 1881. The resolution was being acted upon during all that time, in the Court of Review, and by the commissioners; yet no action was taken by any one to test the power of the corporation to pass such a resolution. There certainly appears by some printed slips of newspapers in the record to have been opposition made in the Court of Review to the appointment of Commissioners; but no step that could be effectual,

or such as was pointed out by the statute, appears to have been taken to have the resolution set aside as illegal. In the Act of 1879, paragraphs 2, 3, 4 and 5 of section 185 of the Act of 1874 were preserved. Now those paragraphs refer particularly to the proceedings of the commissioners in respect to the public notices they were required to give, and of any objections that might be made by those interested, and paragraph 5 makes this special roll final.

My opinion, therefore, on this case, as it presents itself to me, is to dismiss the Petition with costs.

Petition dismissed.

Barnard & Co., for petitioner.

R. Roy, Q.C., for the defendant.

SYMES ET AL. & GINGRAS.

Judgment in the above case was rendered at Quebec, during the February Term, reversing the judgment of the Superior Court. Mr. Justice Tessier dissented. The opinion of Ramsay, J., for the majority of the Court, was as follows:—

RAMSAY, J. This action was brought to demand from appellants a specific sum of money, namely \$48,341 and interest from the 20th May, 1857, on a deed passed on the 18th August, 1854, between the firm of G. B. Symes and Company, then represented by the late George Burn Symes and the late David Douglas Young, and the Respondent.

The parties do not entirely agree as to the nature of this deed. In form it is a sale in trust by respondent to the appellants, of a ship as security for advances made and to be made to the builder and owner, the respondent. This form is borrowed from the English law and is extensively used in commercial transactions here, although it is totally foreign to our legal system. But the form of the deed in reality is of no importance, in considering this case, for our law takes no notice of the names people give their acts, but proceeds at once to examine what has really been done, and subjects the stipulations of the deed to the rules governing the class of contracts to which the deed properly belongs. Thus such a contract as that before us is not considered between the

parties as a fictitious sale, but as an irrevocable *mandat* to Symes & Co., to act in the joint interests of the parties.

Without entering into all the details of the deed, it is only necessary to say that G. B. Symes & Co. were to receive the vessel, and to sell her or any part of the property, when and where they deemed best, and for the best price they could get, and out of the money derived from such sale, or from the earnings by freight or hire, or from money "otherwise coming to their hands on account of" respondent they were to repay themselves and give the balance to respondent. But these stipulations were limited by other covenants in the deed, and it was "further covenanted and agreed, by and between the said parties, that the said vessel shall go to Liverpool, consigned to Messrs. Holderness and Chilton, merchants of that place, or to any other person or persons the said George Burns Symes & Co., their executors, administrators or assigns may see fit to address the same, who shall sell the said vessel as aforesaid," etc. From other words of the deed, we learn that that G. B. Symes & Co. were not bound to sell the ship in Liverpool, but that they might cause her to proceed to London "for the purpose of effecting a sale of the said vessel, and where the said vessel shall be sold, according to the powers in that respect hereby granted, after the arrival of the same on her then first voyage, to the end that all advances of money made under these presents be repaid, with all incidental costs and charges."

The appellants insist that the sale must be "on her then first voyage," but the deed goes on to contemplate a hiring of the ship by G. B. Symes & Co. for other voyages, and there is a provision how the freights and earnings of the vessel shall be dealt with.

These dispositions are rather contradictory, but the contradictions do not give rise to any difficulty in dealing with the case before us. The main question submitted to us arises on the stipulation contained on the 12th page of the deed, respondent's exhibit No. 1. It is in these words: "And it is hereby further agreed and declared by and between the said parties, that the aforesaid vessel and her freight shall at all times be kept insured by the said George Burns Symes and Company,

their executors, agents or assigns, to at least the full amount of the advances made by them in respect thereof, and to such further reasonable amount as the said Jean Elie Gingras may see fit, and that the premium of such insurance shall be deducted from and out of the monies arising from the said premises."

In fact the vessel was sent to Liverpool, consigned to Messrs. Holderness & Chilton. The price of wooden vessels had terribly diminished, owing to the termination of the Crimean war, and the "Empress Eugenie" could only be sold at a ruinous sacrifice for respondent. It was then suggested that if the ship were coppered and re-registered at Loyds, she would shortly sell for a remunerative price, and that in the meantime she could be employed so as to produce a revenue. These operations were carried out at a cost of \$41,004.88, and no question is raised that this was done with the approbation of the respondent; in fact it seems to have been done entirely in his interest, for appellants were fully covered by the securities they had in hand, by freight, and other collections, and by the vessel, which they were entitled to sell at the then low price. The vessel then started on a voyage to Quebec, and she was lost at sea. The whole amount of the indebtedness to G. B. Symes & Co. was for advances, \$115,003.88 and with interest and commissions (amounting to \$23,060) \$138,063.88, and the vessel was only insured for the sum of \$68,800.00 and the freight for 7,600.00

\$76,483.36

When the vessel left Quebec she was insured for \$93,683.36.

The first plea to this action is one of prescription. It is said it was either prescribed as a commercial case by five years, or as an action on the case by six years.

This question gives rise to an involved narrative. The present action bears date the 5th July, and was served on the 14th July, 1876, 21 years after the loss of the ship in question. It seems, however, that so far back as the 15th December, 1857, Symes & Co. had sued respondent for the sum of £2,929 4s., being the balance they claimed to be due them for all their intrusions with regard to the "Empress Eugenie." That to this action, Gingras pleaded an exception of set-off, based on the default of Symes & Co. to insure. They made no incidental

demand. This action proceeded very slowly; Symes died in 1863, and his partner, Young, in 1869, and on the 1st February, 1873, the suit being still pending, the Court House at Quebec was destroyed by fire, and the record in the case of Symes et al., and Gingras, was utterly lost. The legislature of the Province of Quebec then passed an Act to remedy, so far as was possible, the injury done to suitors by this accident. By this Statute they gave means to restore a record under certain circumstances, and if that be impossible, a judge of the Superior Court is authorized "to permit such party to commence such case or proceeding, or to bring an action for the same cause as that set forth in the case or proceeding of the said applicant." (37 Vic., cap. 15, s. 7, Q.)

At the argument, appellant's counsel objected to the judge's order, and seemed to invite us to reverse it. He says that this is not a renewal of any proceeding or the recommencement of any proceeding, but an entirely new action, and that the judge had no power to grant such an order. We have not the means to examine the exercise of the judge's discretion in this matter, for no exception has been taken to the preliminary order, and we know nothing of the merits of the application but what respondent has told us in his declaration. We, however, do know by the admissions of the declaration, that the procedure of respondent was a compensation of the claim of Symes & Co. to the amount of that claim. It might however have been necessary to examine the appellant's claim for all that exceeds the amount pleaded by way of set-off (Sec. 21), that is to say for all the demand beyond £2,929 4s. But from the view we take of the plea of prescription, this distinction becomes unimportant.

The learned judge in the Court below dismissed the plea in so far as it regards the prescription of five years, on the ground that it was introduced by the civil code (2260 s. 4.), and therefore as the prescription in this case began to run before the promulgation of the code, the old prescriptions apply (2270). He also dismissed the part of the plea of prescription, invoking the limitation of 6 years, and we are unanimously of opinion that the learned judge was right in dismissing the plea setting up both of these limitations. With regard to the latter, the prescription of six years was introduced by the 10 and 11 Vic., c. 11, and continued by cap. 67, C. S. L. C. Sec. 1 is in these words, "no action of account or upon the case, nor any action grounded upon any lending or contract without specialty, shall be maintainable in or with regard to any commercial matter, unless such action is commenced within six years next after the cause of such action." And section 5 enacts that "This act shall apply to the

case of any debt of a commercial nature, alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise."

There can be no doubt that this is an action of account; it is also, I fancy, an action on the case; but it is contended that it is not on a contract without specialty. "Specialty" is a technicality foreign to our law. We have not the division of contracts into parol and special contracts as I understand it to exist in the English law. We have therefore to interpret the meaning of this word as applied to our contracts, which are seldom under seal; and in doing this, we cannot come to any conclusion other than this: that a contract before notary is equivalent to an English contract under seal. It is our most solemn act.

The next question that arises is whether all the transactions with regard to this ship fall within the covenants of this deed. It seems to me that the answer to this question must be in favor of the respondent. It is perfectly evident that the deed contemplated further advances than those made before the sailing of the vessel, and that the deed was to apply to them. If this position be correct, Symes & Co. bound themselves to keep the vessel insured for all their advances. Now the contention of this Respondent is that the advances were not so covered at the time of the loss of the vessel, and that, therefore, he was not only relieved of any indebtedness to Symes & Co. for a balance, but that as Symes & Co. had received for him more than the insurance, the Appellants were liable to reimburse him what he had lost by this neglect of Symes & Co. In other words that Symes & Co. were paid off by the insurance.

To this it is answered that the insurance really covered the advances at the time of the loss, that Appellants were not obliged to do more, except at the special demand of Gingras, who not only never made such a demand, but who knew all the time the amount of the insurance, was satisfied therewith, and that it was his interest not to put the insurance higher than was necessary for reasonable safety, as he had to pay the premium, and that no one contemplated the total loss of a new ship between Liverpool and Quebec. It was also contended that Symes & Co. could not be liable to insure the ship for a greater amount than its value, for which it was insured, and that in fact they could not insure it for more.

I cannot concur with appellants in all these pretensions. There is no evidence that respondent acquiesced in any alteration of the contract, and I do not think parol evidence is admissible to prove that he had consented to a lower insurance than that stipulated in the deed—that is, to the insurance of all advances. Nor do I think the respondent is

obliged to enter into the question of whether Symes & Co. could have insured the ship for a greater amount. In addition to this, there is no evidence to establish that the ship could not have been insured for the full amount of Symes & Co.'s advances.

On the other hand, I cannot see how we are to hold the appellants bound to any other obligation than to keep the vessel insured for the advances due at the time of the loss. The question then is, what were Symes & Co.'s advances on the 25th of April, 1855, when the ship was last heard of? This is a mere question of accounts, and it has been so fully explained by the learned Chief Justice, that it is quite unnecessary to allude to the details further than to say that I entirely concur in the principle on which he has made the calculations and the result at which he has arrived. The only point of difference between the members of the Court was as to the application of the monies coming from the "Agamemnon" transactions. It is not denied that if applicable to the "Empress Eugenie" accounts, they were received prior to the loss. But, it is said, Symes & Co. charged them to the general account of Gingras. I am at a loss to see what effect that should have on the contract, which distinctly states that all money coming to Symes & Co. on account of Gingras should go to the extinction of the advances on account of the "Empress Eugenie." It was a mere matter of book-keeping for the information of the firm. Probably they had separate accounts for the "Agamemnon" and the "Alliance," and so forth; but although a man's books may be used against him as evidence of admissions in certain cases, parties are not liable for their books, but for their contracts. The evidence of Mr. Knight was violently attacked on the ground of interest, and bias, and it was also maintained that his evidence was inadmissible. We know nothing against Mr. Knight's integrity, he has no apparent interest, and there is nothing in his evidence to lead us to think it is open to suspicion. As to its admissibility, we have given no heed to it except in so far as it goes to show the state of the accounts. I know of no rule of law which says that evidence of this kind is illegal. It will be observed that the Court has not allowed any evidence to alter or affect in any way the deed, which has been interpreted throughout in the sense given it by respondent. The judgment turns on the application of the monies received. It is not unworthy of remark that in general principle there is no difference of opinion among the judges, and that Mr. Justice Casault seems to have treated "advances" exactly as we do, for he deducted the freight gained on the "Empress Eugenie" on her voyage from Quebec to Liverpool. I therefore fully concur in the opinion of the learned Chief Justice.

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CHIEF JUSTICE MEREDITH.

We do not know whether it is quite in accordance with recognized usage for a professional body to recommend any one, no matter how distinguished, as a proper subject for imperial distinctions. The General Council of the Bar of Quebec is an important assembly, though we should not like to see all their recommendations adopted. In one resolution, however, we heartily concur, and we presume it was the certainty that they expressed the sentiment not only of the profession but of the entire community, which led two very eminent legal gentlemen to propose and second the following resolution at the recent meeting in Montreal:—

Moved by HON. GEORGE IRVING, Q. C., seconded by HON. R. LAFLAMME, Q. C., and unanimously

Resolved, that this council deems it fitting to place on record their warm appreciation of the eminent services rendered as well to the legal profession as to the public by the Hon. Wm. Collis Meredith, chief justice of the Superior Court, during his long and distinguished judicial career, the high character he has always maintained and the universal confidence he has continued to inspire, and to express their belief in the great satisfaction it would give should Her Majesty see fit, in recognition of his services, to confer upon His Honour a suitable mark of her royal favour, and their hope that the matter may be speedily brought to the notice of Her Majesty by the proper authorities. Resolved, that the secretary be instructed to forward a copy of this resolution to the hon. minister of justice.

We need not add anything to the terms of the resolution. The mover and seconder have filled the highest offices in Provincial and Federal administrations, and their recommendation as well as that of the General Council should have some influence. Moreover, on looking back, we find that just three years have glided past since we ventured to make the same suggestion in this journal (*vide* 4 L. N. 169). It is not because Chief

Justice Meredith is Chief Justice of the Superior Court of Quebec that he should be knighted (though this would not be asking much when we reflect that the honour has been bestowed on Chief Justices of places like Fiji), but the distinction should be conferred on the special grounds which are set forth in very moderate terms in the resolution.

A MODERN CHINESE WALL.

What are our friends in the Ancient Capital about? It is all very well to make their Yankee visitors pay sweetly for the privilege of seeing the antiquities in August and September, but now we have the forecast of something more serious. A bill before the Legislature proposes to erect a wall *à la Chinoise* round about Quebec, and here are some specimens of the bricks which are to be used in the construction:—

"119. Every contractor who does not keep house within the limits of the city, and comes to execute contracts or works, must obtain a license from the city clerk, and pay to the city a tax not exceeding five per cent. on the amount of the contracts or works.

"120. Every professional man, business man, mechanic, workman, or day labourer, who has not his residence within the limits of the city, must obtain from the city clerk a license to exercise his profession, art or trade, or to work within the limits of the city, and pay for such license the sum fixed by the council.

"121. For persons who have not their private residence within the limits of the city, the business tax and license shall be double the amount they are for those who have their private residence within the city limits."

Before the lawyer *in partibus* can open his mouth within the sacred precincts, he must elbow his way with the hod-carrier seeking a day's job, in order to get a permit to speak.

This may be all right, but the license for contractors strikes us as particularly amusing. Does not this mean that every proprietor who wants to build or repair a house within the city must pay about five per cent. more, a tax to that amount being levied on competitors from without?

THE LATE CHIEF JUSTICE SPRAGGE.

John Godfrey Spragge, late Chief Justice of the Court of Appeal, Ontario, died at Toronto on Sunday, April 20. The deceased

was born in England on the 16th of September, 1806. He came to Canada with his father in early youth, and applied himself to the study of the legal profession, to which he was admitted in due course. In 1841 he was appointed the first Master of the Court of Chancery of Upper Canada. In 1850 he was appointed Vice-Chancellor, and in 1869, on the death of Chancellor Blake, Mr. Spragge succeeded to the high office of Chancellor. A further step was still in reserve, for upon the death of Chief Justice Moss in 1882, Chancellor Spragge was offered and accepted the office of Chief Justice of the Court of Appeal, which he retained until his death.

The late Chief Justice was painstaking and careful in all that he did, and it is well known that such men, even with moderate parts, make safer judges in these days than those who, through over anxiety to obtain a reputation for brilliancy, fly to eccentricities of judgment. Chief Justice Spragge, however, united to a high degree of conscientiousness, a sound judgment, which was not only unimpaired but cultivated and ripened as years rolled on. As a private citizen as well as in his capacity of Chief Justice of Ontario, he enjoyed the esteem of all classes of the community.

Since the above was written, Chief Justice Hagarty, at the opening of the York Criminal Assizes, April 22, referred to the demise of his learned brother in the following terms:—

"The Court will adjourn early to-day in order to pay the last tribute of respect to the distinguished judge who has just passed from among us. To say that his judicial career of 34 years has been one of unsullied purity, is a tribute that may safely be paid to the memory of all departed judges of Ontario. The province has had the benefit of his high attainments, patient labours, courteous manners, and sagacious judgment for a period almost equal to that of his greatest predecessor, Sir John Robinson, a name dear to all Canadians, and especially to the Bench and bar of his much-loved country.

"Chief Justice Spragge has been taken from us in the midst of his labours, dying in his harness as a good judicial soldier. For myself I have to lament the loss of a valued friend and fellow labourer for many long years, and to one toiling in the same field for nearly nine and twenty years, his death speaks with a mournful significance and timely voice of warning."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, February 21, 1884.

DORION, C.J., MONK, RAMSAY, CROSS, and BABY, JJ.

McDONNELL et al. (plffs. below) Appellants, and BUNTIN (deft. below) respondent.

Procedure—Judgment of distribution—Art. 761, C.C.P.

An action will not lie by a hypothecary creditor, who has not been collocated in a report of distribution for a claim against an immovable mentioned in the registrar's certificate, to recover from a party alleged to have been illegally collocated by preference, the sum which plaintiff claims belonged of right to him. The recourse of a party aggrieved by a judgment of distribution is by appeal, or by petition in revocation, or by opposition to the judgment, as pointed out in C.C.P. 761.

The appeal was from a judgment of the Superior Court, Montreal (Rainville, J.) maintaining a demurrer filed by the respondent to the action of the appellants. (See 6 Legal News, p. 160; 27 L.C.J. 73.)

The declaration alleged that the plaintiffs (appellants) are the owners of a *bailleur de fonds* claim for \$330 on certain real estate described in the declaration, which had been sold by the sheriff, and that Buntin, the respondent, had been collocated by preference and had received under the judgment of distribution the said sum of \$330 which of right belonged to the appellants.

The action was met by a demurrer based chiefly on Art. 761 of the Code of Procedure, which states that "any party aggrieved by a judgment of distribution may seek redress by means of an appeal, or a petition in revocation, etc.," and "any creditor mentioned in the registrar's certificate, who has not appeared in the cause, may, moreover, within fifteen days, seek redress by means of an opposition to the judgment." The respondent contended that the judgment of distribution could not be attacked except in the modes pointed out in the article.

The Court below maintained the demurrer: "Considérant qu'en vertu de l'article 761 du

code de procédure civile, les dites demanderesse ne pouvaient se pourvoir contre le dit jugement que par opposition, dans les quinze jours, ou par appel, ou par requête civile; qu'elles n'ont pas produit telle opposition ou interjeté appel, et que leur présente demande n'allègue aucune des raisons donnant lieu à la requête civile," etc.

In appeal the judgment was unanimously confirmed.

Judgment confirmed.

J. Calder, for appellants.

R. Laflamme, Q.C., counsel.

Bethune & Bethune, for respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, March 27, 1884.

DORION, C.J., MONK, RAMBAY, CROSS, BABY, J.J.

LES ECCLESIASTIQUES DU SEMINAIRE DE ST. SULPICE DE MONTREAL (creditors collocted), appellants, and LA SOCIÉTÉ DE CONSTRUCTION CANADIENNE DE MONTREAL (contestant below), respondent.

Registration—Renewal under cadastral system.

The registration of a deed of sale in which the immovable sold is described by its cadastral number, and in which the purchaser undertakes to pay the amount of a hypothec duly registered before the proclamation of the Cadastre, will not supply the place of the renewal of registration of such hypothec required by C. C. 2172.

The appeal was from a judgment of the Superior Court (Taschereau, J.), setting aside the thirteenth item of a report of distribution, and declaring that the building society, respondent, was entitled to rank before the appellants for the sum due to it.

The following were the *considéran*ts of the judgment of the Superior Court:

"Considérant que l'enregistrement opéré le 14 février 1873, de l'acte de vente du 13 février 1873, (vente par les dits créanciers colloqués à Médéric St. Jean) n'a pas été renouvelé dans le délai requis par la loi après la proclamation pour la mise en force des dispositions de l'article 2168 C. C., dans la circonscription d'enregistrement où est situé l'immeuble vendu en cette cause, et qu'à

défaut du dit renouvellement l'hypothèque conservée aux dits créanciers colloqués par le premier enregistrement ne peut primer l'hypothèque de la demanderesse, résultant de l'acte d'obligation consenti en sa faveur par le dit Médéric St. Jean, le 16 août 1873, et enregistré le même jour, après la mise en force des dispositions du dit article 2168;

"Considérant que l'enregistrement opéré le 8 avril 1874, de l'acte de vente du 21 février 1874 (vente par Médéric St. Jean à Casimir Faille), n'a pu suppléer au défaut de renouvellement d'enregistrement de l'hypothèque susdite des créanciers colloqués, ni constituer un renouvellement du dit enregistrement aux termes des articles 2131, 2168 et 2172 du C. C., le dit acte du 21 février 1874 ne contenant qu'une simple indication de paiement en faveur des dits créanciers colloqués, non présents au dit acte, ne comportant aucun avis au registrateur du renouvellement de la dite hypothèque des créanciers, et n'ayant été enregistré que pour la conservation des droits des parties au dit acte."

RAMBAY, J. This appeal comes up on a question purely of law. It is whether the appellants have lost the priority of their hypothec by their failure to renew, according to the precise formalities of law, the registration of their claim; that is to say, whether what is equivalent will suffice.

The appellants' claim for \$400 was due on a deed of sale from them to one St. Jean, dated the 13th February, 1873, registered on the following day. On the 15th July, 1873, the *cadastre* for the parish of Montreal was put in force, and consequently the time for re-registration expired on the 15th July, 1875. The appellants did not re-register. On the 16th August, 1873, St. Jean hypothecated the property in question for \$1,900, which was duly registered under the new system. It is admitted that if there was nothing but this the appellants have lost the priority of their hypothec. But it is established that on the 21st February, 1874, a deed of sale of the above property was made to one Faille, in which the debt to the appellants was reserved, the purchaser promised to pay it, and this deed referred fully to the previous deed and to its registration by date

and number, and Faille's deed was duly registered on the 8th April, 1874.

The argument is this: Registration is for the purpose of publicity; it is not necessary that all the formalities of the law should be observed; it is not necessary that the registration should be done by the party interested; the registration of the deed by a stranger is as effective as the registration by the creditor or his agent; therefore the registration of the deed to Faille was a good registration of appellant's hypothec, at all events from the 8th April, 1874. Further, it is argued, the requirements of re-registration cannot be greater than those of the original registration; it is specially provided by an act (38 Vic., ch. 14) sanctioned 23rd February, 1874, and consequently before the expiration of the delay to re-register, that the notices mentioned in 2172 may be given by any person for the party interested, and that, as the registration of the deed to Faille would be sufficient as a registration to protect appellants' claim, it is equivalent to a re-registration of the original deed from appellants, being made *en temps utile*, that is before the delay to renew had expired, and that the failure to re-register does not put the respondents in a worse position than they were in before. They took their security subsequently to the registration of the appellants' claim, and when that claim was validly registered, and if the respondents succeed they do so simply by the omission of the appellants to do something that the respondents had no interest in having done.

On the other hand it may be said that the system of registration, like every kind of publication, is the creation of positive law. It is created not for the purpose of giving notice to a particular person who does not know, but in order that no one can plead ignorance. And so the knowledge of the existence of a prior debt does not cover the want of registration. For the same reason it is absolutely necessary to comply with the forms prescribed, and it is not sufficient to do something else that might, if the law had so willed it, have been a sufficient warning. Article 2172 prescribes the requirements for the renewal of registration. There must be a renewal containing a notice describing

the immoveable affected, in the manner prescribed in article 2168, and conforming to the other formalities prescribed in article 2131 for the ordinary renewal of the registration of hypothecs. On turning to 2131 we find there must be "a notice to the registrar, designating the document, the date of its original registration, the immoveable affected, and the person who is then in possession of it; and the volume and page in which the notice of renewal is registered must be referred to in the margin of the original registration." There was no such notice, and consequently there has not even been an attempt at a renewal.

Appellant's argument is supported in this way. He says the Cour de Cassation in dealing with this very subject has invariably laid down the broad rule that the formalities of inscription need not be followed in the renewal.* It seems to me that this is unquestionably the jurisprudence in France. The doctrine as resumed by Aubry & Rau (3: 383) appears to be, 1st, that it is not absolutely indispensable that the renewal should follow all the formalities of the article 2148 C. N.; 2nd, that in default of any enunciation or indication of the previous inscription, "la nouvelle inscription ne vaudrait que comme inscription première. Upon the first point there is tolerable unanimity of opinion, but Troplong evidently considers the requirement of the date as partaking of the character of judge-made law. (3 Pr. & Hyp. 715.) However this may be it has been steadily adhered to.† But the question for us is whether these decisions apply to our law and how far they apply. I am disposed to think that their abstract principle applies. That is to say, I think that here as in France a renewal may be sufficient, if the requirements of the law be substantially, though not literally, complied with. But the law as laid down in France cannot furnish a guide to us as to what is a substantial compliance

* Sir. Cass. 3 Feb. 1819. Dallos, 25 Feb. 1825. Troplong says there is a decision of the Cour de Cassation, 14 Jan. 1818, contra. Dallos, Hyp. 307. I think this must be a mistake, and that properly considered the *arrêt* of 1818 does not turn really on this point. It is not likely the Cour de Cassation would on the 25 Feb. 1819 overrule so recent a decision.

† Sir. Cass. 14 June 1831; 29 Aug. 1838; 16 Feb. 1864.

with the code, for their system differs essentially from ours. Their renewal is prescribed by a very short article, 2154: "Les inscriptions conservent l'hypothèque et le privilège pendant dix années à compter du jour de leur date; leur effet cesse, si ces inscriptions n'ont été renouvelées avant l'expiration de ce délai." Now, the discussion there arose as to whether this meant that a new inscription should be made as directed by article 2148. And the *arrêts* I have referred to are the judicial answer to the question of what it was necessary to do. Here, however, our legislative attention being specially directed to the Code Napoléon, we deliberately devised a system totally different, and which lays down an explicit procedure which must be followed. The party desiring to renew gives the registrar a notice specifying the particulars of the deed to be renewed. This notice is inscribed at full length in a new book, and its inscription is indicated in an index. In addition to this the registrar is obliged to enter on the margin of the original inscription a mention of the renewal. It is quite obvious that a man perfectly conversant with the requirements of the law might follow its behests to the letter for all that he desired to know and never discover that there was a re-registration. That is, he might look at the old inscription which he knew of, and no note in the margin would tell him that that hypothec had any effect (2082). He might turn to the index of renewals and find it totally blank. He might go to the registrar and demand a copy of the deed registered, but no marginal entry would testify to the renewal (2178), or that the deed was other than it seemed, an hypothec which had no effect. Nothing but a full search, which no one is bound to require if he only desires to know a particular fact, would have disclosed the new inscription by Faille's deed. In France it appears that the party is obliged to make a general search, and, therefore, he cannot fail to find the warning. But we are told, a party to the deed, like respondent, knew, and so forth. But under our law, it is not a question of good and bad faith. With us knowledge is nothing, and, therefore, we are not perplexed like the Cour de Limoges when it ruled: "Le renouvellement d'une inscription

hypothécaire est valable bien qu'il ne mentionne pas l'inscription renouvelée. Il en est ainsi surtout vis-à-vis des créanciers qui ont connu l'inscription primitive, et qui n'ont pu dès lors éprouver aucun préjudice de son défaut de mention dans le renouvellement." (Sir. 14 Av. 1848.) It would be impossible to distribute the money arising from a sale if we were to admit this mistaken doctrine of equity. Registration is not the only institution of the law where real rights are lost by *laches*; for instance, the omission to give notice of protest to an endorser, relieves, not because he suffers by not being notified, but because he *may* suffer. I am therefore to confirm.

I may remark, there is a little difficulty which might perhaps be serious under certain circumstances, but which was not raised in this case, and which has no effect on the judgment rendered. Faille's deed gives an incorrect date as being that of the one it evidently intends to refer to.

Judgment confirmed.

Geoffrion, Rinfret & Dorion for Appellants.

Beique & McGoun for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Jan. 25, 1884.

DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.
TANSEY (contesting collocation), Appellant,
and BETHUNE et al. (collocated), Respondents.

Costs—Privilege—Art. 606, C.C.P.

Where a defendant in an action of damages which has been dismissed with costs, causes an immovable belonging to the plaintiff to be taken in execution and sold by the Sheriff, he has a right to be collocated by privilege on the proceeds of sale for his costs of suit as well as for the costs subsequent to judgment.

The judgment appealed from, Superior Court, Montreal (Jetté, J.), maintained the collocation of respondents for their taxed costs in an action, *Emerson v. Darling et al.*, in which the respondents appeared as attorneys for the defendants, and obtained the dismissal of the action with costs.

The appellant, a hypothecary creditor, contested the collocation on the ground that

under Article 606 C. P., the costs of *defending* an action have no privilege, and should not rank before a hypothecary claim against the immoveable sold, inasmuch as Art. 606 (8) mentions only a *plaintiff's* costs of suit.

The Court below maintained the collocation : " Considérant que le privilège pour les frais de justice n'est pas établi par l'article du Code du procédure civile invoqué, mais bien par les articles 1994 et 2009 du code civil, qui ne comportent aucune restriction telle que celle alléguée par le contestant ;

" Considérant qu'en droit ce privilège s'étend à toutes les avances et dépenses faites par qui que ce soit, dans l'intérêt commun des créanciers, et à celles ayant pour résultat d'arriver à la réalisation du gage et à la distribution du prix pour l'avantage de tous ;

" Considérant en outre que l'article 606 du C. P. C., surtout tel qu'amendé par le statut 33 Vict. ch. 14, s. 2, n'a pour effet que de régler l'ordre de collocation des frais de justice entre eux, et ne saurait être interprété de manière à restreindre le privilège accordé pour les frais par les articles précités du code civil ;

" Considérant en conséquence que le défendeur qui, par ses procédures dans l'espèce, a procuré la réalisation du gage commun des créanciers du demandeur, ne saurait dans les circonstances être privé du privilège susmentionné," etc.

In appeal, the judgment was confirmed, Ramsay, J., dissenting.

Judgment confirmed.

Culder, for appellant.

Bethune & Bethune, for respondents.

COURT OF REVIEW.

MONTREAL, Jan. 31, 1884.

Before JOHNSON, J., TORRANCE, J., RAINVILLE, J.

JOUBERT es qual. v. WALSH.

Substitution—"Enfans"—Interpretation.

In a deed of donation creating a substitution the term "children" ["enfants"] was held to include grandchildren, it not appearing from the terms of the deed that the word "children" was used in a restricted sense.

The case was inscribed by the defendant,

in Review of a judgment of the Superior Court, District of Joliette, (Mathieu, J.)

The judgment maintained a petitory action brought by the plaintiff as tutor to his minor children, whom he alleged to be substitutes under a substitution said to have been created by the will of their great-grandfather and great-grandmother.

The Court of first instance maintained the action, holding that the word "children," either in the disposing part or in the conditions of substitutions, applies to more than one degree unless it appears from the terms of the instrument that the word "children" was used in a restricted sense. (See 12 R.L. 334, where the judgment is reported.)

In Review, the judgment was unanimously confirmed.

J. A. N. McConville for plaintiff.

Barnard, Beauchamp & Barnard for defendant.

THE QUEBEC BAR.

At a general meeting of the Bar of the Province of Quebec held in the Montreal court house on the 15th and 16th instant, there were present Mr. J. B. L. Houde, *batonnier général*, in the chair, Hon. R. Laflamme, Hon. G. H. Malhiot, Hon. George Irvine, Messrs. W. White, C. A. Geoffrion, and S. Pagnuelo, secretary-treasurer of the council. In addition to the resolution referring to Chief Justice Meredith, noticed elsewhere, the following resolutions were unanimously adopted :—

Moved by Mr. Pagnuelo, Q.C., seconded by Hon. R. Laflamme, Q.C., and

Resolved, That, following the suggestion made by the examiners, first, the lieutenant-governor be prayed to compel the universities which confer degrees in law in this province to give the report mentioned in section 44, paragraph 2, of the Act of 1881, concerning the bar ; second, that section 44, paragraph 1, of the said act be amended, repealing the part referring to two years of study in a university, and confining ordinary clerkship to four years; third, that candidates for practice who have obtained a degree in law must furnish to the examiners a certificate from the rector or principal of the university or college of the number of lessons received by each candidate in each branch of law, and the said examiners may refuse to accept such degree as valid if they are of opinion

that the programme submitted to the lieutenant-governor, or prescribed by him, has not been efficiently followed.

Moved by the Hon. George Irvine, Q.C., seconded by Mr. Pagnuelo, Q.C., and

Resolved, That this Council renews the opinions which it has already unanimously expressed on February 2nd, 1883, and May 26th, 1883, that the need for reform in the administration of justice becomes more and more urgent, and that the importance, the extent and the difficulty of preparing a good scheme of procedure requires the appointment of a commission composed of a judge and two practising advocates, who will consult the local councils, the general council and the judges, and will prepare an elaborate scheme accompanied by a statement of motives.

Moved by Hon. R. Laflamme, Q.C., seconded by Mr. Wm. White, Q.C., and unanimously

Resolved, That while reiterating the opinion of the necessity of a complete consolidation and reform of the Code of Civil Procedure by a duly constituted commission, this council suggests to the Hon. Attorney-General that certain amendments to the act of last session and of the said code urgently require the attention of the Provincial Legislature at the present session, and that these should be immediately enacted in substance and to the effect following:—That 46 Victoria, chapter 26, be amended by substituting the following words for clause 1. Every judicial day shall be reputed to be a term day for the enquête and hearing of cases, in the Superior Court as in the Circuit Court, whether they are inscribed for enquête only or for enquête and hearing; at the same time, nevertheless, in districts other than those of Montreal and Quebec, the Superior Court shall not sit on the days for holding the Circuit Court in that district; the Circuit Court and the Superior Court for cases inscribed for enquête and hearing shall sit only during the days now fixed as term days for those courts respectively, or which shall be so fixed hereafter according to the mode established by law. 2. That paragraph 3 of section 2 be repealed and the following substituted: The official stenographers shall be officers of the Court and paid fees by the party producing the witness. The judge may give judgment without waiting for the notes of evidence to be copied. Nothing in this act shall be interpreted as affecting the provisions of the Code of Procedure with regard to the vacation of July and August, nor as binding the Court to sit between December 23rd and January 9th. 3. Article 1054 of the code of civil procedure as amended by the Act of 34 Vict., chap. 4, is amended by

striking out the words "except in the districts of Quebec and Montreal," and by substituting in the place thereof the words "except in the districts of Quebec, Montreal, Saint Francis and Three Rivers." It is, however, declared that the Circuit Court in the districts of St. Francis and Three Rivers other than that sitting at the cities of Three Rivers and Sherbrooke shall continue to have the same jurisdiction in appealable suits as heretofore. Every appealable cause in the Circuit Court sitting at the cities of Sherbrooke and Three Rivers, commenced before the coming into force of this act and wherein final judgment shall not have been rendered, shall cease to be within the jurisdiction of the Circuit Court, and all proceedings, orders and judgments in every such case shall be taken, made and rendered in the Superior Court, and the books, archives and records of the Circuit Court relative to every such case shall belong and be transmitted to the Superior Court immediately after the coming into force of this act. Notwithstanding anything mentioned in the Act cap. 26, 46 Vic., the powers and jurisdiction conferred upon prothonotaries and clerks of Circuit Courts under articles 89, 90, 91, 92 and 93 of the Code of Civil Procedure are hereby continued and declared to be and to have always been in full force, and the powers conferred by said articles upon prothonotaries of the Superior Court and clerks of the Circuit Court, may be exercised by them during the terms of the Superior Court and Circuit Court as in vacation, and the said Superior and Circuit Courts shall have power to render judgments in such cases upon plaintiff's affidavit. That every insolvent trader may be required by one or several creditors for a total sum of \$200, to make an assignment of his effects for the benefit of his creditors; such insolvent debtor will be obliged to assign his effects to the clerk of the Superior Court of the district where he resides, in conformity with the dispositions of articles 763, 764, 765 of the Code of Civil Procedure. Every insolvent may make such assignment voluntarily in the same manner. Every interested party may then ask the judge to call a meeting of the creditors, and the judge is to call such meeting with little delay, in such way as he deems proper, to appoint a curator for the effects of the said debtor. Articles 770 to 779 inclusive apply to the present Act; except that the words "*sous cautionnement*" be omitted from 773. Article 776 is amended by adding: every debtor arrested on a *capias*, who omits to make assignment and to produce the statement required by Articles 763 and 764 is submitted to the same penalties. Every debtor who has assigned his goods, as above, is submitted to the summary jurisdiction of the judge and of the court, on pain of contempt of court.

Resolved, that a committee of this council consisting of Messrs. J. B. L. Houde, the Batonnier-General, Bossé, Irvine and the secretary-treasurer, be appointed to carry out the objects of this resolution, and to revise the phraseology of such bill as may be prepared with the view above stated.

RECENT ENGLISH DECISIONS.

Criminal Law—Larceny.—The prisoner and another person went to an inn. The prisoner asked the barmaid for whiskey. He put down half a sovereign, and received 9s. 6d. in silver in change. He then asked for the half-sovereign back, saying he thought he had change. She gave it back. His companion then asked for a cigar. She served him with it. The prisoner then put down 10s. in silver and a half-sovereign, asking the barmaid to give him a sovereign for it, which she did. His companion kept on engaging the barmaid's attention. The prisoner never returned the 9s. 6d. which the barmaid gave him in the first instance. The barmaid never intended to part with her master's money except for full consideration. The prisoner having been convicted on an indictment for larceny of the money, the court sustained the conviction. *Crown Cases Reserved*, Nov. 21, 1883. *Regina v. Hollis*. Opinion by Lord Coleridge, C.J. (49 L. T. Rep. 572.)

Agency—When agent to sell may warrant.—A servant intrusted by his master with the sale of a horse at a fair may have an implied authority to give a warranty to the purchaser. *Brady v. Todd*, 9 C.B. (N.S.) 592, commented on and distinguished. *Q. D. Div.*, December 4, 1883. *Brooks v. Hassell*. Opinions by Lord Coleridge, C.J., and Stephen, J. (49 L. T. Rep. [N. S.] 569.)

Suretyship—Discharge of surety by dealings with principal.—The rule that a surety is discharged by the creditor dealing with the principal, or with a co-surety, in a manner at variance with the contract, does not apply to the case of co-sureties who have contracted severally. The appellant agreed to guarantee advances made by the respondent bank to one K. to the amount of £1,000; M. had previously guaranteed advances to K. to the amount of £600. The bank afterward re-

leased M. from his liability in consideration of a new guaranty given by him. *Held*, that such release constituted no defence in an action by the bank against the appellant on his guaranty, it not being averred that his right of contribution against M., if any, was injuriously affected. *Privy Council*, July 11, 1883. *Ward v. National Bank of New Zealand*. (49 L. T. Rep. [N.S.] 315.)

GENERAL NOTES.

In the session of the parliament of Canada which closed on Saturday, the 19th inst., one hundred and five acts were passed, of which forty were government measures, thirty-five related to railways, nine to insurance companies and five to banks.

Did any one ever think how much space it required to bury the dead? If one would be content with a grave two feet by six, 3,630 bodies could be interred in one acre, allowing nothing for walks, roads or monuments. On this crowded theory London's annual dead, numbering 81,120, would fill twenty-three and one-half acres.

Speaking of the evasion of law (says the *Albany Law Journal*) some governor, forbidden by law to commute, has respited a murderer for fifty years. Of course we know nothing of the particular hardships of the case in question, but the act looks like an unhandsome evasion of the law. It is such acts that inspire if they do not excuse lynching.

Judge Turner, of the original court of Franklin County, Va., directed the following order to be entered on record at the recent sitting:—"It appearing to the court from the testimony of medical experts that the applicant is of the male sex, and that his present name is inappropriate, it is ordered that his present name of Lydia Rebecca Payne, be changed to that of Lawrence Regester Payne, which shall henceforth be his lawful name."

From the edition of Messrs. Geo. P. Rowell & Co's American Newspaper Directory for 1884, now in press, it appears that the newspapers and periodicals of all kinds at present issued in the United States and Canada reach a grand total of 13,402. This is a net gain of precisely 1,800 during the last twelve months, and exhibits an increase of 5,618 over the total number published ten years since. The increase in 1874 over the total for 1873 was 493. During the past year the dailies have increased from 1,138 to 1,254; the weeklies from 9,062 to 10,023; and the monthlies from 1,091 to 1,499. The greatest increase is in the Western States. Illinois, for instance, now shows 1,009 papers in place of last year's total of 904, while Missouri issues 604 instead of 523 reported in 1883. Other leading Western States also exhibit a great percentage of increase. The total number of papers in New York State is 1,523, against 1,399 in 1883. Canada has shared in the general increase.

The Legal News.

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LORD COLERIDGE ON SOCIETY JOURNALS.

Chief Justice Coleridge has had an opportunity of expressing from the bench his opinion of that portion of the press which exists by gratifying the appetite for scandal and gossip. Mr. Edmund Yates, a literary man of some note, who is also proprietor of the *World* newspaper, was prosecuted before the Queen's Bench Division of the High Court of Justice, for a libel in the *World* upon the Earl of Lonsdale. The libel was in these terms:—

"A strange story is in circulation in certain sporting circles concerning the elopement of a young lady of very high rank and noble birth with a young peer, whose marriage was one of affection, but whose wife has unfortunately fallen into a delicate state of health. The elopement is said to have taken place from the hunting field. The young lady, who is only one or two and twenty, is a very fair rider and the gentleman is a master of hounds."

This was generally understood to indicate the Earl of Lonsdale, but to do Mr. Yates justice, it must be stated that he declared in an affidavit that he did not see the paragraph until it was in proof, and did not know that it applied to the Earl. He also endeavoured in subsequent issues to do away with the effect of the paragraph which was entirely unfounded. However, he was prosecuted criminally, and a sentence of four months' imprisonment was pronounced. Mr. Yates has appealed, and it is probable that the sentence may be annulled on a technical ground (that the Public Prosecutor's *fiat* had not been granted prior to the application for the information). The following observations were made by the learned Chief Justice in passing sentence:—

"Now this is certainly not the time nor the place for delivering any discourse upon the subject of the liberty of the Press, nor is it in the least degree necessary. No one who breathes English air or has ever had his heart touched and his judgment moved by the 'Areopagitica' of Milton will doubt that the

free Press of this country has been, on the whole, an unspeakable blessing, or will desire to narrow in any degree its fair or lawful scope, or impede its lawful exercise. Public affairs, and public men, using the expression "public" in its largest possible sense—literature, art, science, religion, the catalogue might be indefinitely extended—these things are the fair and lawful topics of discussion in the Press, and these may be freely discussed, and I hope discussion of them will always be practically and absolutely unfettered. But when we come to private matters very different considerations obviously arise. Public men—in England, at least—must submit to public comment as one of the necessary ingredients of their career. But private men—and, indeed, all men, public or private—in their private relations are entitled to have their privacy respected. Why should we have our lives pried into, our movements watched, our dress recorded, our company catalogued, our most private relations dragged into the light of day—not for any conceivable good—to the great English people, but only to gratify the foolish vanity or the abject curiosity of a small minority of a privileged class. I find it, I declare, difficult to believe that any man's mind can feel pleasure in feeding on this sort of food, with which the columns of the paper before me are filled. I can hardly believe that any educated man or any gentleman can feel anything but humiliation and self-contempt in having to supply such food. We have, however, in this case to deal with a gross personal libel in a paper which lives on the publication of the most utterly attenuated personalities. It is not the case of a paper of high aim and real public usefulness committing a breach of the law inconsistent with its general conduct and character. We have to deal with a personal libel, occurring in the midst of paragraphs which are not indeed libellous but are made up of personalities so trivial that, prior to experience, one would have supposed they could not possibly have interested for a single moment in the faintest possible degree any human being. More than this, it seems from the defendant's own affidavit that at least one lady of high rank caters, and is paid for catering, to this paper

by supplying it with personalities at a fixed price. It appears that a "lady of title" is paid at the rate of two guineas for such paragraphs. The proprietor of the paper makes no inquiry and the slander appears for the gratification, I must suppose, of the readers of the *World*. The defendant appears to think this makes his case better; but to me and my colleagues it seems to make it worse. To open a sort of "lion's mouth" into which all the personal gossip of what is pleased to call itself "society" is to be "shot" anonymously, at the rate of two guineas a personality, and to take no trouble to inquire into the truth of what is published—one cannot suppose a system more certain to lead, as it has led in this case, to the publication of cruel slander and stories tending to the discomfort and unhappiness of those who are the subjects of them. It has been often said that it is the publisher, not the inventor, of scandal who does the real mischief; and the defendant, to my mind, adds to rather than diminishes his responsibility by the course which he has pursued. But more than this. He has stated that he had no idea that this paragraph, into the truth of which he took no pains to inquire, applied to the Earl of Lonsdale. But he has not stated to whom he believed it to apply, and he has not stated that he believed it to apply to anyone, so that he "shot his bolt" at a venture at the casual passer-by—some one he had never seen, whom he did not know, whom he had never heard of—taking the chance of its doing him a cruel injury. Now, what in such a case is to be done to the defendant? It is a libel unprovoked, unjustifiable, and published in a paper that lives on personalities and pays for their manufacture. The sentences of Courts of Justice should, if possible, be the expression of the intelligent opinion of the public, whom, in a certain sense, they represent. Over-severity takes the shape very often, or appears to take the shape, of personal vengeance; it seems to be the outcome of anger rather than judgment, and creates—and properly—a reaction in favour of the over-punished victim. It is therefore desirable that we should do nothing that may seem to savour of excessive severity. We have considered whether it would suffice

to inflict a fine, but a fine on a person conducting a successful paper with a large circulation is a matter of comparative indifference. It is right, therefore, that the liberty of the defendant should be interfered with, though to no harsh, cruel, or unreasonable extent. The sentence of the Court, therefore, is that the defendant be imprisoned for four months."

VIEWS OF MONTREAL ABROAD.

The *Law Journal* (London) publishes a letter from a correspondent in Montreal, treating of our legal system. The view expressed is apparently the superficial observation of a stranger, but in the main it is correct. The writer seems to be under a misapprehension, however, on one or two points. He says, for instance: "The procedure is admirably adapted for trying contested suits, though very halting, slow, and defective as respects undefended causes, there being nothing corresponding to your special endorsement system at home." The difference is more in form than substance, and certainly does not justify the epithets "halting and slow."

The writer also appears to think that the ranks of the unoccupied members of the profession are more thronged here than in London. He says: "The leading offices of the city undoubtedly do well, but outside of these hunger rules the crowd." This is picturesque, but it gives an erroneous impression of our legal world. It would probably be more true to say that "hunger rules the crowd" in London than in Montreal—that is to say, the proportion of the members of the profession whose time is not fairly well occupied is probably much smaller in Montreal than in a great capital like London. After all, does the public lose by this state of things? It is the intensity of competition that gives to every country some of its most valued men, who only find "room at the top." H. B. Thomson, in his "Choice of a profession" (London, A.D. 1857), says: "There are thus 1,500 unsuccessful advocates, each anxious to rise, each contending for the next opening to practice that may occur by the promotion, retire-

"ment, or death of any senior member. "Amidst such a crowd, disappointment of the cherished hopes of early life is far more common than success; nor is the competition for the other class of legal prizes, namely, legal appointments, less keen." * * * "The law does not maintain one-fourth of those who probably have nothing but their profession to look to for their support." If this be true in London, it certainly has never been true in Montreal or other colonial cities.

Lord Abinger was of opinion that £400 a year was the smallest income on which a barrister should begin. This may have been true in his day. But the toil exacted of a successful barrister is now so infinitely increased that a gentleman with \$2,000 (£400) assured to him would find himself nowhere in the race. When we look into the history of those who have succeeded, we almost invariably find it true that where "hunger rules the crowd," the effect has been increased exertion. Without the stimulus of necessity more than half the distinguished lawyers of the past would never have emerged from obscurity.

NOTES OF CASES.

CIRCUIT COURT.

ST. SCHOLASTIQUE, April 2, 1884.

Before BELANGER, J.

MARTIN V. THE CORPORATION OF THE COUNTY OF ARGENTEUIL.

Municipal Code, Arts. 100, 698—Selection of place for exhibitions of Agricultural Society—Minutes of proceedings of Council.

1. *The declaration prescribed by 32 Vict. c. 15, s. 41, with reference to the organization of agricultural societies, is only required for the formation of the Society. The signature of forty persons at the date of formation is sufficient to give the society a legal existence, and it is not necessary that persons becoming members subsequently should sign the declaration.*
2. *The choice of a place for exhibitions of an Agricultural Society, within the meaning of 37 Vict. c. 5, s. 2, does not imply that the*

particular site for the permanent buildings must be determined at the meeting of members; e. g., a resolution choosing "Lachute, in the parish of St. Jerusalem d'Argenteuil," is sufficient.

3. *It is not necessary that the resolutions and by-laws passed at a meeting of a municipal council should be written out at length and signed by the presiding officer at the time of the meeting.*
4. *A by-law of a county council, fixing a permanent place at which all exhibitions of an agricultural society shall be held, is not a by-law within the meaning of Articles 100 and 698 of the Municipal Code.*

PER CURIAM. On the 30th June, 1883, the Board of Officers and Directors of the Agricultural Society of the County of Argenteuil, determined to establish and fix a permanent place for the exhibitions of the said Society, and in consequence convoked a special meeting of the members of the said Society at Lachute, to be held at Lachute, in the Parish of St. Jerusalem d'Argenteuil, the 1st August, 1883.

At this meeting, the majority of the members permitted to vote, adopted a resolution choosing Lachute as being the place where the permanent buildings for the exhibitions should be erected, and this notwithstanding the protests of certain interested parties.

On the 12th Sept. following, the County Council decided that a By-law should be prepared fixing Lachute, as being the place where the said permanent buildings should be constructed.

On the 7th November following, the following By-law was submitted to the Council, and adopted unanimously by the members present. "In the future all exhibitions of the Agricultural Society of the County of Argenteuil, shall be held at Lachute in the Parish of St. Jerusalem d'Argenteuil, in the County of Argenteuil."

The petitioner, relying on Articles 100 and 698 of the Municipal Code, demands by his petition the setting aside and annulment of this by-law of the County Council, as well as the annulment of the resolutions of the Board of Officers and Directors of the Agricultural Society, of the 30th June, and of the said meeting of 1st August, 1883, and of the

resolution of the County Council of the 12th Sept. 1883, as being irregular, illegal, null and void, for the following reasons :—

1st. Because the meeting of the pretended members of the said Agricultural Society, was not called by the Board of Officers and Directors of said Society ; the said Board not being then nor now in legal existence.

2. Because the pretended choice of Lachute, for the erection of permanent buildings for the exhibitions of the said Society in said County, by the pretended members of said Society, is illegal, null and without effect, and contrary to the letter and spirit of the law.

3. Because a particular place (lot of land) in Lachute or elsewhere should have been indicated or chosen by the resolution of the 1st August, 1883, and not "Lachute" purely and simply, the word "Lachute," meaning a territory without defined limits, but being generally known and recognized as comprising the whole Parish of St. Jerusalem d'Argenteuil, of which the superficial contents are over one hundred miles.

4th. Because at said meeting of the 1st August, 1883, one hundred and thirteen persons, residents of St. Andrews, and who had offered to pay their entrance fee to the Secretary-Treasurer at the meeting of the 12th June, making a sum of \$113, and who had fulfilled all the other requirements of law to become members of the said Society, had been refused their right as members of the said Society, and had been prevented from voting at the said meeting of the 1st August, 1883.

5th. Because the minutes of proceedings of the meeting of the said Council of the 12th September, were not immediately entered in the register of the Council, but were only taken by the Secretary-Treasurer as notes on fly-sheets of paper in pencil, according to memory of said proceedings, and that said notes had not yet been entered in said register nor approved by the Council ; nor signed by the Warden and Secretary-Treasurer.

6th. Because the said By-law passed the 7th November, 1883, was passed without any authority in law by said Council, and for an Agricultural Society having no legal

existence ; that said By-law was passed and adopted when it was only written upon fly-sheets of paper and in pencil, and that the same had never been approved of, nor signed by the presiding officer, nor entered in the Register of proceedings of the said Council, as required by law.

The Corporation of the County of Argenteuil, *Mise en cause*, replied to this petition by two answers-in-law, and a special reply also.

By its first answer-in-law, it pretends that the petitioner cannot in law demand the annulment of this By-law until the same has been put into force by its promulgation.

By its second answer-in-law, the *Mise en cause* pretends that the petitioner cannot by his petition, attack the validity or illegality of the election of Officers and Directors of the said Society, or their quality as Officers and Directors, *bona fide* of the said Society, nor the validity or illegality of the resolutions of the 30th June, 1883, and of the 1st August, 1883, by invoking as a reason the non-legal existence of the said Society and its officers.

In the second place, it pretends that the resolution of the meeting of members of said Society of the 1st August, 1883, making choice of "Lachute," for the erection of permanent buildings for the exhibitions of the said Society cannot be attacked by such a petition.

The third point of law invoked by the County Council, is that the By-law passed by the said Council on the 7th November, 1883, is not a Municipal By-law, in the sense of the Municipal Code, nor subject to the control of any of the provisions of the Municipal Code, and consequently that said By-law is not susceptible of being quashed or annulled in virtue of the provisions of the said Code, but that the proper remedy to be adopted by the petitioner against the By-law and resolutions was an appeal to the Commissioners of Agriculture, as indicated by the statutes regulating Agricultural Societies.

The special answer is a negation both in law and in fact of all the allegations of the petition ; the County Council alleging the fact that the petitioner with others has already appealed to the Commissioner of Agriculture to annul the said resolutions and

By-law, for the same reasons as he does by the said petition.

Lastly, the County Council by a plea says that all the proceedings both of the Board of Officers and Directors of said Society, the members of said Society, and before the County Council, had been made, written and signed as required by law.

By the 37th Vic., Cap. 5, Sec. 2, which amends the 44 Sec. 32 Vic. Chap. 15, it is provided that "when the Board of Officers and Directors of an Agricultural Society of a County determine to establish a permanent place where the exhibitions of the Society shall be held, it shall call a special meeting of the members of the Society, by giving fifteen days' notice thereof, mentioning therein the object of the meeting, and the meeting thus called shall make choice of the place, in its opinion the most central and convenient in the County, on which to erect permanent buildings in which future exhibitions shall be held."

3rd. The proceedings of the said meeting shall be submitted to the Municipal Council of the County for its approval, at its first general meeting after reception of the said proceedings, and if the choice made by the Society be approved of, the Council of the County shall pass a By-Law ordering that in future all exhibitions of said County shall be held at the place so chosen."

"Nevertheless if twenty members of the Society, after such approval, disapprove of the choice so made, they may within thirty days from the passing of the said By-law, appeal to the Commissioner of Agriculture, by Petition signed by at least twenty members of the said Society, exposing their complaints, and the decision of the Commissioner shall be final."

One of the reasons invoked by the Petitioner to show the illegality of this By-Law, consists in alleging the nullity of the proceedings of the Board of Officers and Directors of the said Society, and of the nullity of the proceedings of the meetings of members of said Society; and for this he commences to attack the legal existence of the Society itself, by alleging that according to law, to become a member of an Agricultural Society, it is necessary, not only to have paid

the entrance fee, but also to have signed the Declaration contained in the Schedule A. Cap. 15, 32 Vic; and that such a Society cannot exist until forty persons have thus conformed to the law, and have become members; that as a fact none of the persons who pretend to have been members of said Society, at the date of said resolutions, had signed said declaration, and therefore were not in fact nor in law members of the said pretended Society, which in consequence had no legal existence, and could not and were not able to elect a president, vice-president and directors, and thus that the election of the officers and directors of said Society was null. Then he proves that of all those who signed the Declaration, Schedule A., there remained but a small number of about forty.

I do not think this pretention of the petitioner is sustained by law.

The Sec. 41, 32 V. Cap. 15, says that "an Agricultural Society may be formed in each County, when forty persons have become members thereof, and have signed a declaration in the form indicated in Schedule A. annexed to present Act, and such Society shall be composed of the persons who shall then have signed or who shall hereafter sign such declaration."

In my opinion this declaration is only necessary for the formation of the Society. It is true that the end of this section says, "and such Society shall be composed of the persons who shall then have signed or who shall hereafter sign such declaration," which might be understood to mean, taking these words literally, that those persons only who have signed such declaration shall be members.

But I think that the intention of the Legislature becomes perfectly clear if one examines the terms of the Schedule A, itself: "We the undersigned, agree to form ourselves into a Society in virtue of the provisions of the Act concerning the Board of Agriculture and Public Works, which shall be called 'The Agricultural Society of the County of _____,'"

It seems to me very evident that this form of declaration was not made for persons becoming members of the Society, ten years, or a long time after its formation.

It has been proved that more than forty persons have signed this declaration at the time of the formation of the Society, which was sufficient to give a legal existence to the Society, and besides it has been shown to have been in operation for a number of years. Wherefore I conclude that the Officers and Directors of the said Society have been legally elected, and that the resolutions of the 30th June and of the 1st Aug., were also legally passed. Besides what right has the Court to go out of the limits circumscribed by the Municipal Code? None, I think. The Agricultural Society of the County of Argenteuil has performed its functions for a number of years, all its acts and proceedings are presumed to be *bona fide* and in conformity to the law so far.

But, says the Petitioner, the resolution of the 1st August, 1883, at least is null, because one hundred and thirteen persons who had conformed to the requirements of the law to become members, and who were consequently members of the Society, were prevented illegally from voting on the said resolution, although they offered their votes.

Unless the contrary be shown, such questions cannot be raised on such a proceeding as the present one, unless these defects or illegalities be apparent on the face itself of the proceedings.

The jurisdiction of the Court in such a case as this is quite special, limited to certain matters; and the Court has not the right, under the pretext of inquiring into the legality of a By-law of a Council, as in the present case, to scrutinize the legality of the elections of the said Society, or of its proceedings, unless as I have said, all these proceedings of the Society be evidently null and illegal on their face, which is not so in the present case. Of all the illegalities invoked by the Petitioner against the acts and proceedings of the said Agricultural Society and of its Board of Officers and Directors, if there be any illegality, however, there is only one which would appear on the face itself of the proceedings of the meeting of the members of the said Society, that is to say, the resolution of the said meeting of the 1st August, 1883.

It consists as pretended in that the meeting instead of choosing a particular piece of land

in the County whereon to construct permanent buildings for the exhibitions, chose by its resolution, "Lachute," to wit an extent of land comprising the whole Parish of St. Jerusalem d'Argenteuil.

If the law actually authorises the meeting of members of the Society to make choice of a particular piece of land for the exhibitions and buildings, I am then with the petitioner, and I say that it is one of those defects or apparent illegalities which have the effect of vitiating the act of the Council, that is to say the By-law approving such choice; the reason therefor is evident, the Council is indeed authorized to approve by By-law of the choice that the law permits the members of the Society to make, but if the choice so made, instead of being that authorized by the law, is contrary to the law, on the face itself of the resolution making this choice, the authority of the Council is at an end; and in that case the nullity of the one imports the nullity of the other.

But unfortunately, I believe that the petitioner is deceived in the interpretation of the law, and even of the resolution of the members of the Society.

Section 44, Cap. 15, 32 Vic. ordains that "each Agricultural Society organized in a County shall be a corporation under the name of The Agricultural Society of the County of ———," and shall have power "acquire and possess lands whereon to hold exhibitions, to establish thereon a model school of agriculture or a model farm, and it may sell, lease or otherwise dispose of them, but it shall not possess more than two hundred acres at one time."

Sec. 2, Cap. 5, 37 Vic., amends this section by adding the following paragraphs, "2nd: "When the Board of Officers and Directors of an Agricultural Society of a County or part thereof, shall determine to establish a permanent place where the exhibitions of such Society shall be held, it shall call a special meeting of the members of the Society, by giving fifteen days' notice thereof, mentioning the object of such meeting, and the said meeting thus called shall make choice of the place, which in the opinion of such meeting is the most central and most convenient in such County or part of

"County, on which to erect Permanent Buildings in which future exhibitions shall be held."

Sec. 3. "The proceedings of the said meeting shall be submitted to the Municipal Council of such County for its approval, at its first general meeting after the receipt of the said proceedings. If the choice made by the said Agricultural Society is approved, the said County Council shall pass a By-Law ordering that in future all exhibitions of said County or part of County, shall be held at the place so chosen."

On the 30th June last the Board of Officers and Directors passed the following resolution: "That this Board of Officers and Directors of the Agricultural Society of the County of Argenteuil do hereby determine to establish a permanent place for the exhibitions of the said Society."

And another resolution: "That a special meeting of the members of the Agricultural Society of the County of Argenteuil be held in the Court House, at Lachute, in the Parish of St. Jerusalem d'Argenteuil in the said County of Argenteuil, on Wednesday the first day of August next, (1883) at the hour of one of the clock in the afternoon for the purpose of making choice of a place, which, in the opinion of such meeting, is the most central and most convenient in the said County of Argenteuil, on which to erect Permanent Buildings in which future exhibitions of the said Society shall be held."

On the 1st August, 1883, at the place and hour fixed by said Board, this meeting of the members of the Society took place, and adopted the following resolution: "That it is the opinion of this meeting that Lachute, in the Parish of St. Jerusalem d'Argenteuil, in the said County, the County-town of said County, is the most central and most convenient place in the said County of Argenteuil, on which to erect such permanent buildings, and that such permanent buildings shall be erected at Lachute aforesaid."

It is this choice which was approved of by the By-law of the Council, declaring that in future all exhibitions of the said Agricultural Society should be held at Lachute, in the Parish of St. Jerusalem d'Argenteuil, in the County of Argenteuil.

The law as we have seen, says, that the meeting shall make choice of "the place which

"in the opinion of such meeting is the most central and most convenient in such County, on which to erect permanent buildings."

It is true to say that the legislature "might be held to" say by that, that the choice should be made of a particular piece of land and not of a locality, village, town or some territory, relatively restricted comparatively to a whole County.

I do not believe it, for it would thereby reduce the powers to acquire, which belong to the Board alone, almost to uselessness, by forcing them to acquire a lot of land, which in such case, they could not in all probability obtain, or only under most onerous conditions.

It is much more reasonable to suppose that the Legislature had the intention to leave to the members the choice of a place comparatively restricted in the County, to there hold the exhibitions, and for the Board of Officers and Directors to acquire a lot or piece of land in the limits of the place chosen, according to the powers which are conferred upon them by clauses 44 and 69, cap. 15, 32 Vic., who alone have the power to acquire and possess lands for the Society; saving the control of the commissioners of Agriculture to whom they are subject in all cases.

Several dictionaries have been cited about the meaning of the words place, *lieu*, *endroit*; these words have evidently a sense more or less extensive or limited, according to the object which they express, or are used in connection with, or compared with, be it territories or expanse of country more or less limited. Besides it is not so much the words that are to be interpreted, but more the intention of the law.

All the authors who treat on the interpretation of laws, tell us that it is necessary before all to seek the intention of the legislator, and not to attach a strict and grammatical sense to each word.

It is pretended that "Lachute" means or comprehends the whole Parish of St. Jerusalem d'Argenteuil, comprising an immense territory more than one hundred thousand acres, and that in consequence the words place, *endroit*, *lieu*, of which the law makes use cannot be applied to it.

Witness have even been heard to prove that by "Lachute," all the Parish of St. Jerusalem d'Argenteuil is understood.

This would be all very good, if the resolution of the members of the Agricultural Society, had not limited or explained in some manner, the word, "Lachute." It seems to me that Lachute, "in the Parish of St. Jerusalem d'Argenteuil," does not mean the Parish of St. Jerusalem d'Argenteuil, but indeed the Village known under that name, in the Parish of St. Jerusalem d'Argenteuil.

It is still objected that the Village not being incorporated, comprises an undefined terri-

tory, without appreciable limits. It is true that the limits of an unincorporated Village has not well marked limits, but every one knows what is meant when it is said that something shall be done in such a Village, for example, at Lachute, in such a parish; and it is well understood that such would mean, within the limits of the group of houses, which is known under the name of such village.

I pass now to the allegation of the petitioner that the By-law is null and illegally passed, that it was passed before being prepared and written at length in the register of proceedings; that the Secretary-Treasurer only took notes on fly-sheets of paper, which were not drafted until after the sitting, and that the same was not signed by the presiding officer, nor by the Secretary-Treasurer, as soon as it was passed, and during such sitting.

The Secretary was heard, and proved that the By-law was completely drafted on a fly-sheet of paper, save a word or two which he had to add or modify at the commencement of the minutes of proceedings, but which affected the substance in no way thereof, but only the form of the proceedings, and did not affect the By-law. That he wrote all the proceedings including the By-law in the register of proceedings, as he always did, after the sitting, the same day or the day after, and that the whole was afterwards read at the session of the 12th December, and approved of and signed by the Warden and himself.

I see nothing irregular in all this; the Secretary did thereby, what all the Secretary-Treasurers have always done since the existence of the municipal law, and I will add even that he has only done what our Code authorized him to do. Article 157, cited by the petitioner, seems to me to be clear in this sense. It says, speaking of the duties of the Secretary-Treasurer, "He assists at the sitting of the Council and draws up minutes of all the acts and proceedings thereof, in a register kept for that purpose and called 'The Register of proceedings.' All minutes of the sitting of the Council must be approved of by the Council, signed by the person who presided over the Council during such sitting, and countersigned by the Secretary-Treasurer."

When should these minutes be drawn up, entered in the register, approved of by the Council and signed?

Evidently all this cannot be done during the same sitting, it is never done, and the law does not require it, and I think even the thing is not practicable; for how could the minutes of proceedings of the Council be not only drawn up and entered in the register and signed during the same sitting, and also contain at the same time, the motion for adjournment which puts an end to the sitting?

This motion and the consequent resolution which makes part of the proceedings, could not be entered in the register until after the sitting, and consequently neither the approval nor the signing of the minutes is possible during the same sitting.

For all these reasons, I see no other alternative, but to dismiss the petition of the petitioner.

Independently of these reasons there is another invoked by the County Council, and which seems to me peremptory, and which must take the first place. It is that such a by-law cannot be annulled in virtue of the Municipal Code.

Articles 100 and 698 M. C. well provide in what manner a by-law may be sought to be annulled because of its illegality; but these proceedings are restricted to the matters provided by the Code, that is to say to By-laws, *procès-verbaux*, &c., that the Code authorizes to be made, and not to those matters which have no connection with it, and are only authorized by laws quite distinct from the Code, and which are not amendments to it, and which have not even the most distant relation to municipal affairs.

It is well understood that I do not mean to say, that the petitioner could have recourse to the authority of the Commissioner of Agriculture for the redressal of his complaints here: that is quite another question which I do not conceive it necessary to touch upon.

All that I decide is, that the petitioner has no right to bring his complaints before this Court, and that this Court, the jurisdiction of which is limited, has no right to enquire into this case.

The petition is dismissed with costs.

The following is the text of judgment:—

"The Court having heard the parties, as well on the law pleadings as on the merits of this cause, on the petition of the said petitioner in this cause, and the pleadings of the *Mis-en-cause*, and having heard the respective proofs of the said parties, and upon the whole deliberated;

"Considering that Articles 100 and 698 of the Municipal Code are not applicable to the By-law of the County Council of the County of Argenteuil of the 7th November last, and of which the petitioner demands the setting aside and annulment by his petition in this cause; and that the powers and authority of this Court are not applicable to the said By-law in virtue of the said Article of the Municipal Code—the jurisdiction of the said Court in such cases being limited and restricted to matters arising from or controlled by the said Code only;

"Dismisses the said petition with costs."

J. A. N. Mackay for petitioner.

G. E. Bampton for Corporation of the Co. of Argenteuil.

The Legal News.

VOL. VII. MAY 10, 1884. No. 19.

REVOCATION OF PARDON.

Under this heading we noticed (Vol. VI., p. 49) a singular case which occurred in Ohio. A convict under sentence of imprisonment for life, obtained a pardon from Governor Foster on the faith of medical certificates declaring that he was in the last stages of a fatal disease. But by the time the man got home there was no trace of ailment left. The Governor, learning that he had been duped, revoked the pardon. The case was taken to the Supreme Court of Ohio, and the decision of that tribunal is now reported (*Knapp v. Thomas*). The Court holds "that a full, unconditional pardon, delivered, is irrevocable; and where a person imprisoned on a sentence for felony seeks a discharge by *habeas corpus*, based on such pardon, the pardon having been issued by the Governor pursuant to the constitution and statute, on the certificate of the physician to the penitentiary that the prisoner is in imminent danger of death, it is not competent in this State, under existing statutes, to impeach such pardon in such proceeding, by proof that the physician's certificate was obtained by false representations of the prisoner, and his fraudulent acts, with respect to his health, such representations having been made, and acts done, for the purpose of obtaining such certificate and such pardon."

EUSTON v. EUSTON.

The English papers contain a report of the trial in this case before the Probate, Divorce and Admiralty Division. It is described by the *Times* as "perhaps the most extraordinary case ever tried in the Divorce Court." The circumstances are certainly very peculiar, and if met with in a work of fiction would be pronounced very improbable. The petition was presented by the Earl of Euston, eldest son of the Duke of Grafton, for a declaration of nullity of marriage, on the ground that when he married the respondent

she had a husband living. The respondent was a courtesan known as "Kate Cooke," with whom the petitioner became acquainted in 1871. He was induced to marry her, and settled upon her £10,000 to which he was entitled on his own account. The union, naturally, was an unhappy one, and the consort, after a good deal of discomfort, separated finally in 1875. Suspicion being aroused that the woman had a husband living at the time the marriage ceremony was performed between her and the Earl, inquiries were pursued under great difficulties, and it was ascertained at last that "Kate Cooke" had been married to one George Manby Smith in 1863, and that Smith was still alive. It was supposed that he had gone down in a ship which sailed from London for Australia, but the person drowned, it was proved, was named George Maslin Smith.

At this stage the case for annulling the marriage seemed to be complete, and suit was commenced. But never were solicitors more disappointed. The respondent, it is true, was forced to admit the identity of Smith, but it appeared that Smith, on his part, had a wife living at the time the ceremony of marriage was performed between him and "Kate Cooke." Therefore that marriage was invalid, and "Kate Cooke" was lawfully married to the nobleman who is now in the direct line of succession to the dukedom of Grafton. The petition was therefore dismissed.

NEW PUBLICATIONS.

PARTIES TO ACTIONS: THE LAW RESPECTING PARTIES TO ACTIONS, LEGAL AND EQUITABLE; by Horace Hawes, Counsellor at Law.—San Francisco; Messrs. Sumner Whitney & Co., Publishers.

This work, which is issued in the neat and convenient form of a pocket volume, purports to give the gist of the decisions of the courts upon the subject of Parties to Actions, as concisely as is consistent with a full presentation of the points decided, and by arrangement of the subject-matter and index, to place this information at the "finger-tips" of the lawyer. It is a work to be kept at the elbow of the busy practitioner, rather than

on the shelf of the scholar, as the author says in his preface. The division by chapters is as follows:—

I. Parties, their rights and remedies; II. Jurisdiction; III. Necessary and proper parties; IV. Aliens, non-residents, Indians, Trustees, Assignees, etc; V. States, counties, cities and towns; VI. Public officers; VII. Bankrupts and insolvents; VIII. Infants, Insane Persons, Idiots; IX. Husband and wife; X. Executors and administrators; XI. Landlord and tenant, Joint tenants, and tenants in common; XII. Master and servant, Principal and agent, Principal and surety, Bailor and bailee; XIII. Partnerships, Corporations, unincorporated associations, etc. XIV. Of the Joinder of Parties. XV. Of the misjoinder and non-joinder of parties, amendment and new parties. XVI. Abatement, revivor, etc.; XVII. Intervention; XVIII. Interpleader.

There is an excellent Index, covering 200 pages.

LYRICS OF THE LAW.—A recital of songs and verses pertinent to the law and the legal profession, selected from various sources, by J. Greenbag Croke. Publishers: Sumner Whitney & Co., San Francisco, 1884.

This collection of lyrics of the law embraces a great many scraps of interest. Some of them may seem without value to those actively engaged in the practice of the profession, but they would be useful and amusing in proper hands at a bar dinner. We have only room at present for the following:—

“A LAWYER’S WILL.

This is my last will and testament:
Read it according to my intent.
My gracious God to me hath given
Store of good things, that, under heaven,
Are given to those that love the Lord,
And hear and do His sacred word:
I therefore give to my dear wife
All my estates, to keep for life,
Real and personal, profits and rents,
Messuages, lands, and tenements;
After her death I give the whole
Unto my children, one and all,
To take as ‘Tenants in Common’ do
Not as ‘Joint Tenants’, *per mie, per tout*.
I give all my Trust Estates in fee
To Charlotte, my wife and devisee,
To hold to her, on trust, the same

As I now hold them in my name.
I give her power to convey the fee
As fully as though ‘twere done by me,
And here declare that from all charges,
My wife’s “receipts are good discharges.”
May God Almighty bless his word
To all “my presents from the Lord,”
May he his blessings on them shed
When down in sleep they lay their head.
And now, my wife, my hopes I fix
On thee, my sole executrix—
My truest, best, and to the end,
My faithful partner, crown, and friend.

In witness thereof, I hereunto
My hand and seal have set,
In presence of those whose names below,
Subscribe and witness it.

26th January, 1835.

J. C. G. [L.S.]

This will was published, sealed and signed,
By the testator, in his right mind,
In presence of us, who, at his request,
Have written our names these facts to attest.”

THE PROPOSED CODIFICATION OF OUR COMMON LAW: A paper prepared at the request of the Committee of the Bar Association of the city of New York, appointed to oppose the measure. By James C. Carter, a member of the Committee. New York, 1884.

This is a very learned and interesting essay on the subject of the proposed codification of the common law of the State of New York. Mr. Carter is an earnest opponent of the scheme, and the Bar Association apparently agree with him, as they have directed that three thousand copies of Mr. Carter’s paper be printed and circulated among the members of the Legislature and the Bar of the city and State. We regret that we have not been able to give this pamphlet such a careful examination as it deserves. With us codification is an established fact, and although complaint may be made of obscurity in some parts and omissions in others, yet no one suggests that the Code should be swept away. As Sir James Stephen says, referring to the proposed Criminal Code in England:—“When a sufficient number of judicial decisions have clearly defined a principle, or laid down a rule, an authoritative statutory enactment of that principle or rule superseding the cases on which it depends is a great convenience on many well-known grounds, and especially because it

abbreviates the law and renders it distinct to an incredible extent." A carefully prepared code is a great boon, and we predict that the advocates of codification in the State of New York will sooner or later prevail.

A SHORT RESPONSE TO A LONG DISCOURSE: An answer by Mr. David Dudley Field to Mr. James C. Carter's pamphlet on the proposed Codification of our Common Law. New York, 1884.

In this paper Mr. Field vindicates his draft Code from the charges of Mr. Carter. He rather sneers at the New York Bar Association as "a highly respectable association of 800 lawyers out of 7,000 in the city—one in nine," and declares that there is nothing new in Mr. Carter's pamphlet. "It is the same old committee, so far as appears, and it is the same old story, which the Legislature, the Bar, and others interested in the subject have heard time and time again, for the last nine-and-thirty years. The voice is a little disguised, it may be, when heard from behind the curtain, but as the actor advances to the foot-lights, we behold the same visage glaring at us that has glared so often before. To change the figure a little abruptly, 'The voice is Jacob's voice, but the hands are the hands of Esau.'" It may be judged from the foregoing that Mr. Field's style is animated, and his reply is interesting reading.

LETTERS UPON THE INTERPRETATION OF THE FEDERAL CONSTITUTION, known as the B. N. A. Act, 1867, by the Hon. T. J. J. Loranger. Quebec, 1884. First Letter.

This is a republication of letters which appeared in the daily newspapers, treating of federal and provincial relations. In the first Letter the *Mercer* case is discussed. Mr. Loranger, it is well known, holds extreme views on the subject of provincial rights, and in these Letters his pretensions are supported in a voluminous argument.

CATALOGUE BY SUBJECTS, OF THE BOOKS PRESENTED TO MCGILL COLLEGE BY MR. JUSTICE MACKAY.

Mr. Justice Mackay, on retiring from the Bench of the Superior Court, generously pre-

sented his very valuable law library to McGill University. We have now before us a catalogue by subjects of the works comprised in the gift, showing that for a private collection it is unusually complete, and forms an important adjunct to the University library.

SPEECH OF MR. MACMASTER, M. P., ON THE LIQUOR LICENSE ACT, 1883.

Mr. Macmaster, Q. C., delivered an able address in Parliament, in the course of the debate on the McCarthy Act, on the 18th of March last. We have received a pamphlet copy of the *Hansard* report, which makes a valuable addition to the literature of the Constitutional Act. Mr. Macmaster quotes a remark made to him by Mr. J. P. Benjamin in England, referring to the difficulties which occur in the interpretation of a written constitution: "You appear to have great difficulty in interpreting your Constitution, which has only been in existence for fifteen years; but I can tell you, after a practice of thirty odd years in the United States, and subsequently in England, where I often had to do with cases relating to the Constitution of the Colonies in the House of Commons and the House of Lords, that these cases are increasing year by year and day by day, and although we thought in the United States that the difficulties of our Constitution would be settled in the first fifteen or twenty years of its existence, the present day has developed difficulties that we never contemplated, and that are ten times as great as any that existed in the first half century of its existence."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, Jan. 15, 1884.

Before MATHIEU, J.

Hon. Sir A. CAMPBELL, es qual. v. JUDAH.
Rights of the Crown—Compensation—C. C. 9,
1187, 1188.

Art. 9 of the Civil Code refers only to such rights and prerogatives of the Crown as are attributions of the sovereignty, and not to such rights as may be possessed equally by subjects. Hence Articles 1187 and 1188 of the Code apply to ordinary claims of the Crown,

and compensation may be pleaded between a claim of the Crown for the price of land sold and a debt due by the Crown for salary.

The judgment, which fully explains the point decided, is as follows :

" La cour, après avoir entendu les parties par leurs avocats sur la réponse en droit par le demandeur au second plaidoyer du défendeur en cette cause, examiné la procédure et délibéré :

" Attendu que le demandeur ès qualité de ministre de la justice et de procureur-général pour la Puissance du Canada, et comme tel agissant pour et au nom de Sa Majesté, réclame du dit défendeur comme légataire universel de feu Henry Judah, décédé le 10 février 1883, en vertu du testament de ce dernier en date du 1er mai 1876, qui fut prouvé dans la cour supérieure à Montréal le 14 février 1883, et enregistré au bureau de la division d'enregistrement de Montréal Ouest le 1er juillet 1883, la somme de \$18,941.92, pour intérêt sur la balance du prix de la vente de l'ancien bureau de Poste à Montréal, No. 146 du Quartier Ouest de la cité de Montréal, consentie à Maurice Cuvillier par l'Honorable Sir Hector Langevin, K.C.M.G., ministre des Travaux Publics de la Puissance du Canada, au nom de Sa Majesté la Reine, le 4 novembre 1873, conformément à certaines conventions entre le dit Maurice Cuvillier et l'Hon. Alex. Campbell, maître-général des Postes de la dite Puissance, en date du 3 avril 1871, qui furent confirmées par un ordre du Gouverneur-Général en Conseil du 8 mai 1871, quel acte de vente sous seing privé du 4 novembre 1873 fut déposé dans les minutes de W. A. Phillips, notaire, le 25 octobre 1875, et enregistré le 7 décembre 1875, lequel terrain fut ensuite vendu par le dit Maurice Cuvillier à Henry Hogan, par acte devant le dit M^{re}. Phillips, notaire, le 25 octobre 1875, puis vendu par le dit Henry Hogan au dit Henry Judah, par acte devant le même dit notaire, le 14 décembre 1876, enregistré le 21 décembre 1876 ;

" Attendu que le dit défendeur, dans son second plaidoyer, offre en compensation de la réclamation du demandeur ès qualité et pour autant la somme de \$568.34 pour loyer et dépenses de bureau et la somme de \$7,060, pour balance du salaire du dit Henry Judah

comme commissaire sous le statut pour l'abolition des droits seigneuriaux dans le Bas Canada depuis le 31 mars 1879 jusqu'à la date de sa mort ;

" Attendu que le dit demandeur ès qualité demande le renvoi de cette partie du dit second plaidoyer du dit défendeur parceque le défendeur ne peut plaider compensation contre la couronne, et que la dette par lui réclamée et offerte en compensation n'est pas également claire et liquide ;

" Considérant que par les dispositions de l'article 1188 du code civil, la compensation s'opère de plein droit entre deux dettes également liquides et exigibles et ayant pour objet une somme de deniers ;

" Considérant que la créance offerte par le défendeur en compensation pour autant de la créance du demandeur ès qualité, est une créance liquide et qui paraît exigible d'après les allégations du plaidoyer du défendeur ;

" Considérant qu'il est bien vrai que la couronne n'est pas mentionnée dans les articles 1187 et 1188 du code civil ; mais que les dispositions de l'article 9 du code civil, qui décrètent que nul acte de la législature n'affecte les droits ou prérogatives de la couronne, à moins qu'ils n'y soient compris par une disposition expresse, ne s'appliquent qu'au cas où ces droits ou prérogatives appartiennent à la couronne comme attribution de la souveraineté, et que ces dispositions ne s'appliquent pas au cas où les droits de la couronne sont des droits qui lui sont communs, et qui peuvent appartenir également aux sujets ;

" Considérant que dans l'espèce la réclamation du demandeur ès qualité est pour le prix d'une vente d'immeuble, et que la qualité de créancier du demandeur ès qualité est une créance ordinaire qui ne fait pas partie du domaine de la couronne et des droits de la souveraineté, et que les dispositions des articles 1187 et 1188 du code civil lui sont applicables ;

" Considérant que par le serment du couronnement tel que décrété par le statut impérial de 1688, chapitre 6, de la première session du règne de Guillaume et Marie, le Roi ou la Reine jure de gouverner le peuple du royaume conformément aux statuts passés en parlement et aux lois et coutumes de ce royaume ;

"Considérant que ce ne serait pas conforme aux dispositions de ce serment si Sa Majesté pouvait acheter et vendre des propriétés et exercer les droits des sujets sans être soumise aux lois qui les concernent et qui ont été sanctionnés par Sa Majesté en parlement;

"Considérant que la dite réponse en droit est mal fondée : A renvoyé et renvoie la dite réponse en droit."

Answer-in-law dismissed.

Church, Chapleau, Hall & Atwater, for the plaintiff

A. Branchaud, for the defendant.

SUPERIOR COURT.

MONTREAL, April 29, 1884.

Before JOHNSON, J.

DENAULT es qual. v. BANVILLE.

Action en déclaration de paternité—Evidence.

In an action en déclaration de paternité, where the defendant admitted the connection with the mother, but assigned a date which would disprove his paternity of the child, and there was no evidence of improper conduct of the mother otherwise: that the Court would give weight to her declaration on oath that the defendant was the father. Absolute certainty in such cases is not required: it is sufficient to establish a strong probability that the defendant is the father.

JOHNSON, J. This is an action *en déclaration de paternité* brought by the mother of a child to whom she has been appointed tutrix, and of which the defendant is alleged to be the father.

The defence—a most cruel one if unfounded—is that the mother was a woman of loose habits, and that the child, which was of full term, could not be the defendant's, as he only had connection with her in December, 1882, and the child was born in July, 1883. The defendant therefore acknowledges his connection with this woman, but suggests, (and we have only his word for it) that it took place in December. As to alleged intimacy with other men, it is not proved. There were some technical objections made as to the registration of the *tutelle*; but they have no weight.

The woman swears the connection took place in October, 1882, and that the defendant is the father of the child.

Other evidence shows that it is probable, and there is nothing to suggest a loose life in this woman, nor that any one else might have been the father of her child.

We have nothing to do here now with any right that might be claimed by this woman for herself. She asks nothing for herself—it is not an action of damages:—there is nothing before the Court but the right of the child to have its paternity declared, and to be maintained, and the woman's evidence for the child is quite admissible. Fournel in his well known and well written treatise, says at page 118, speaking of the "*exception tirée de l'inconduite de la fille enceinte*": Cette exception est devenue le "moyen banal employé par ceux qui sont poursuivis en déclaration de paternité. Ils ne manquent jamais d'opposer que la complaisance qu'ils ont éprouvée n'était point une faveur particulière, mais que plusieurs autres ont participé au même destin; et par cette imputation d'inconduite et de désordre, ils cherchent à éluder les dommages et intérêts, et la charge de l'enfant.

"Mais il s'en faut bien que cette exception produise cet effet; elle ne peut (lorsqu'elle est justifiée) s'appliquer qu'aux dommages et intérêts, sans que l'accusé puisse s'en aider pour la charge de l'enfant." In the present case, as I have said, nothing whatever is proved against this woman in the way of other misconduct; but if there was, what says Fournel? At the following page (119): "Mais, quand l'inconduite de la fille est bien établie dans la cause, ce n'est point une raison pour dispenser l'accusé de se charger de l'enfant, si d'ailleurs il est suffisamment avéré qu'il y a eu copulation entre les parties." Here the fact is admitted in the plea. Surely the defendant would not have admitted it if untrue, and as surely "he cannot by assigning a particular date to it, negative the fact itself." The late Mr. Justice Rolland used to say in these cases: "The Court must find a father for this child." Fournel says the same thing. He says: "On ne peut le chercher que parmi ceux qui ont fréquenté la mère." Here we have no suggestion of any one in particular who could have been the father, except the defendant. Fournel observes in another place (120) that the word of the mother is very weighty in such a case, and that "even supposing she might

"be wrong," "les magistrats ne craignent pas de faire une injustice, en chargeant de l'éducation de l'enfant celui qui peut au moins en être le père, et qui n'offre aucun moyen plausible pour la négative. De deux possibilités il faut choisir celle qui étant plus vraisemblable, est aussi la plus utile à l'enfant: il lui faut un père" (as Ch. J. Rolland used to say): "Le bon sens veut qu'on le choisisse parmi ceux qui se sont exposés à le devenir. Après tout, l'objet des magistrats n'est pas de rencontrer nécessairement l'auteur de la paternité naturelle. Il suffit qu'il y ait dans les présomptions de quoi asseoir une paternité vraisemblable. Celui sur qui elle tombe ne doit imputer qu'à son imprudence et à son inconduite de s'être exposé à ce soupçon." And then, Fournel gives some most extraordinary cases which I will forbear from referring to more particularly, but going on the main principles laid down by the recognized authority of Fournel, I say what else is *vraisemblable* in this case, except the paternity of the defendant? I say more: I say this infamous defence alleging the misconduct of the woman, failing as it does most miserably, what other defence has this man before the Court? None, absolutely none, but technicalities and sophistries which are too futile to be noticed. I have no doubt that upon the well understood principles governing such a case, the judgment must be for the plaintiff: and accordingly the defendant is held to be the father of the child; and to pay for its support.

Judgment for the plaintiff.

E. N. St. Jean for the plaintiff.

Mercier & Co. for the defendant.

CIRCUIT COURT.

MONTREAL, January 25, 1884.

Before DOHERTY, J.

CARMEL V. ASSELIN et al., and GIRARD, opposant.

Partnership—Dissolution.

1. The members of a general partnership are jointly and severally liable for the obligations of the partnership, whether it be still existing or not.
2. The creditor of such partnership is not obliged to proceed against the property of the firm before seizing the effects owned by the partners individually.

The defendants are hotel keepers at Montreal, carrying on business under the firm of "P. Asselin & Cie."

The plaintiff, a judgment creditor of the firm, caused the effects of Girard, one of the partners, to be seized at his domicile. Girard opposed the seizure on the ground that his individual property could not be seized under a judgment against the firm for a debt of the firm. It was also alleged that the notice of sale was irregular.

The plaintiff contested the opposition, alleging that the firm was dissolved, and had no known place of business nor assets, and that the defendants were jointly and severally liable.

The Court dismissed the opposition.

Sarasin for opposant.

D'Amour for contestant.

CIRCUIT COURT, 1881.

SHERBROOKE, July 2, 1881.

Coram DOHERTY, J.

ANDERSON V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

The Railway Act—Actions for indemnity—Limitation of six months.

The six months' prescription under "The Railway Act" applies to actions for the value of horses or cattle killed on the railway track.

This was an action of damages, in which plaintiff claimed, from the defendants, the value of a horse killed on their track, near Richmond, P. Q., on the 17th September, 1880.

The writ was issued on the 22nd April, 1881, more than six months after the alleged occurrence.

The plaintiff's declaration alleged that the fences separating the railway from the plaintiff's pasture were insufficient; that the horse, owing to the bad state of the fences, got on the track, and was killed in consequence of defendants' neglect to maintain the fences in proper condition.

The defendants pleaded the prescription of six months established by "The Railway Act."

W. White for defendants:

The laches of which the plaintiff complains, is the failure of the defendants to fulfil an

obligation imposed by the Statute. The 42 Vict., Cap. 9, Sec. 27, enacts that "All suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted *within six months*." This is precisely the same language as used in the original Act, 14 & 15 Vict., Cap. 51, Sec. 20.

The meaning of the words "*by reason of the Railway*" is clearly set forth in the Act 8 Vict., Cap. 25, Sec. 49.

This prescription was maintained in 1857 in the case of *Boucherville v. Grand Trunk Railway Company*, reported in 1 Vol. L. C. J. p. 179, and the same jurisprudence obtained in the Province of Ontario:—See 20 Upper Canada Q. B. R., p. 202; 9 Upper Canada C. P. R., p. 164.

H. B. Brown, for the plaintiff, urged that the damages complained of did not arise "by reason of the Railway." That the language of a Statute establishing a prescription must be construed in a limited sense, and could not be enlarged by inference. He relied on two cases reported:—One in 1855, 1 L. C. J., p. 6; the other in 1856, 6 L. C. R., p. 172.

PER CURIAM.—The prescription pleaded applies to the damages alleged. The action is dismissed with costs.

H. B. Brown, for plaintiff.

Hall, White & Panneton, for defendants.

THE SINS OF LEGISLATORS.

Herbert Spencer, in the *Popular Science Monthly* for May, has the following upon "the sins of legislators." It may be useful reading for some of our ambitious law-makers:

In a paper read to the Statistical Society in May, 1873, by Mr. Janson, Vice-President of the Law Society, it was stated that from the statute of Merton (20 Henry III.) to the end of 1872, there had been passed 18,110 public acts, of which he estimated that four-fifths had been wholly or partially repealed. He also stated that the number of public acts repealed wholly or partly, or amended, during the three years 1870-'72 had been 3,532, of which 2,759 had been totally repealed. To see whether this rate of repeal has continued, I have referred to the annually-issued volume

of "The Public General Statutes" for the last three sessions. Leaving out amended acts and enumerating only acts entirely repealed, the result is that in the last three sessions there have been repealed separately, or in groups, 650 acts *belonging to the present reign*. This, of course, is greatly above the average rate; for there has of late been an active clearance of the statute-book going on. But, making every allowance, we must infer that within our own times repeals have mounted some distance into the thousands. Doubtless a number of them have been of laws that were obsolete; others have been demanded by changes of circumstances (though seeing how many of them are of quite recent acts this has not been a large cause); others simply because they were inoperative; and others have been consequent on the consolidations of numerous acts into single acts. But unquestionably, in multitudinous cases, repeals came because the acts had proved injurious. We talk glibly of such changes—we think of cancelled legislation with indifference. We forget that before laws are abolished they have generally been inflicting evils more or less serious, some for a few years, some for tens of years, some for centuries. Change your vague idea of a bad law into a definite idea of it as an agency operating on people's lives, and you see that it means so much of pain, so much of illness, so much of mortality. A vicious form of legal procedure, for example, either enacted or tolerated, entails on suitors costs, or delay, or defeat. What do these imply? Loss of money, often ill-spended; great and prolonged anxiety; frequently consequent illness; unhappiness of family and dependents; children stunted in food and clothing—all of them miseries which bring after them multitudinous remoter miseries. Added to which there are the far more numerous cases of those who, lacking the means or the courage to enter on lawsuits, and submitting to frauds, are impoverished, and have similarly to bear the pains of body and mind which ensue. Seeing, then, that bad legislation means injury to men's lives, judge what must be the total amount of mental distress, physical pain, and raised mortality which these thousands of repealed acts of Parliament represent!

RECENT SUPREME COURT DECISIONS.

Dominion Controverted Election—Railway Pass—37 Vict., Cap. 9, Secs. 92, 96, 98 and 100.—In appeal, four charges of bribery were relied upon, three of which were dismissed in the Court below, because there was not sufficient evidence that the electors had been bribed by an agent of the candidate. The fourth charge was known as the Lamarche case. The facts were as follows: One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railroad, to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the tickets without any promise being exacted from or given by them. The tickets or passes showed on their face that they had been paid for, but there was evidence that L. had received them gratuitously from one of the officers of the Company. The learned judge who tried the case found as a fact that the tickets had not been paid for, and were given unconditionally, and therefore held it was not a corrupt act.

Held (1) Fournier and Heary, JJ., dissenting, that the taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 39 Vict., Cap. 9 (D). (2) That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98 a corrupt practice, and would avoid the election. (3) Fournier, J., dissenting, that an appellate court will not reverse the decision of the judge who tried the case on a question of fact, without its being made apparent that his decision was clearly wrong.—*Berthier Election Case, Genereux v. Outhbert.*

GENERAL NOTES.

The Hon. George Irvine, Q.C., has been appointed by the Imperial Government, Judge of the Vice-Admiralty Court of Quebec, in the place of the late Mr. O'Kill Stuart.

In 1883 the total collections from law fees reached \$86,609, of which Montreal paid \$47,762, or more than one-half; and from licenses \$272,423 was obtained, Montreal contributing \$176,772 and all the rest of the province only \$96,651.

The banquet offered by the bar and other friends to Mr. J. J. MacLaren on the 26th April, on the occasion of his departure for Toronto, was enthusiastic and most gratifying. We do not share the misgivings which were expressed by one or two (non-legal) speakers, and think it safe to predict that Mr. MacLaren will take an honorable position at the bar of the sister province.

Chief Justice Hagarty has been appointed Chief Justice of Ontario, in the place of the late Chief Justice Spragge, and it is understood that Chief Justice Wilson of the Common Pleas will take the place vacant by the acceptance of the post of president of the Court of Appeal by Judge Hagarty, and that Mr. Justice M. C. Cameron will take the place vacated by Judge Wilson.

Lord Coleridge is delighting his English friends with stories of his American visit, and among them was this:—He was at Mount Vernon with Mr. Evarts, and, talking about Washington, said: "I have heard that he was a very strong man physically, and that, standing on the lawn here, he could throw a dollar right across the river to the other bank." Mr. Evarts paused a moment to measure the breadth of the river with his eye. It seemed rather a "tall" story, but it was not for him to belittle the Father of the Country in the eyes of a foreigner. "Don't you believe it?" asked Lord Coleridge. "Yes," Mr. Evarts replied. "I think it's very likely to be true. You know a dollar would go farther in those days than it does now."—*Ex.*

In the *March Century* the author of the "Bread Winners," in answer to the accusation of his critics that "It is a base and craven thing to publish a book anonymously" says: "My motive in withholding my name is simple enough. I am engaged in business in which my standing would be seriously compromised if it were known that I had written a novel. I am sure that my practical efficacy is not lessened by this act; but I am equally sure that I could never recover from the injury it would occasion me if known among my own colleagues. For that positive reason, and for the negative one that I do not care for publicity, I resolved to keep the knowledge of my little venture in authorship restricted to as small a circle as possible. Only two persons besides myself know who wrote 'The Bread Winners.'" This seems to indicate an unfounded prejudice against writers of fiction. What would such people say to Disraeli, Lytton, Scott?

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WAGERING CONTRACTS.

In the recent case of *Irwin v. William* the Supreme Court of the United States pronounced on the question of contracts to deliver at a future day. It was held that a contract for the sale of goods to be delivered is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the sellers, and the price to be paid by the buyer. If under guise of such a contract, the real intention is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void.

As to the position of the broker it was held that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he cannot recover for services rendered or losses incurred by himself, on behalf of either, in forwarding the transaction. Compare *Fenwick v. Ansell*, 5 L. N. 290; *Allison v. Macdougall*, 6 L. N. 93.

WELDON v. WINSLOW.

Mrs. Weldon, whose suit against her husband was noticed on page 101 of this volume, has gained a victory over the doctor of the asylum who certified the fact of her insanity. The case is of interest, as it shows how jealously the judges of England regard the slightest interference of an unlawful character with the liberty of the person. Mrs. Weldon sued Dr. Forbes Winslow for entering, on the 13th April, 1878, a house where she resided and committing an assault upon her in attempting to confine her as a lunatic,

and also for libel, the libel being in a letter to her husband on the same day, in which he wrote, "I have seen Mrs. Weldon, and deem it my duty to inform you that it is imperative that immediate steps to secure her should be taken." The defendant, as to the alleged assault, set up an order upon certain certificates under the Lunacy Statutes for her seclusion as a lunatic; and as to the alleged libel he pleaded that the occasion was privileged, and that the letter was written without malice and in the discharge of his duty. The case was tried at great length before Baron Huddleston, and the learned Judge held that the order, coupled with the certificates of medical men, protected those who acted under them in entering the house and attempting to take Mrs. Weldon, and that as to the libel it was privileged, there being no evidence to show that it was written maliciously or from an improper motive, and so he directed a nonsuit or verdict for the defendant.

The plaintiff, Mrs. Weldon, then applied for a new trial on the ground of misdirection. The main question arose upon the count for libel, viz., whether there was any evidence of improper motive to take away the privilege arising from the occasion. Mr. Justice Manisty, in the Queen's Bench Division, remarked that the case was one of the most important that had come into Court for many years. It was a case involving the liberty of the person under the most extraordinary circumstances.

Mr. and Mrs. Weldon were married in 1860. In 1871 they went to reside in Tavistock house, and continued to reside there until July, 1875, when they separated, the husband allowing the wife to remain at Tavistock house, with £1,000 a year. The lady continued to reside there, doing nothing to annoy any one, and being in no sense dangerous to any one, though, perhaps, entertaining some strange notions or delusions. At one time she went over to Paris with a number of orphan children whom she was having instructed in singing. In April, 1878, when she returned suddenly, she found persons in her house of whom she had to get rid. Soon after her return proceedings were taken to have her confined as a lunatic. Mr. Weldon, her

husband, communicated with Dr. Forbes-Wilson, the defendant, and in consequence of that, on the next day, Sunday, April 14, Dr. Wynn, father-in-law of the defendant, and another medical man had an interview with Mrs. Weldon under feigned names, and entered into conversation with her, in which, they afterwards said, she seemed to entertain some strange notions. Now, Dr. Winslow was at that time the registered proprietor of a private lunatic asylum at Hammersmith, as far as appears, unknown to Mr. Weldon except by reputation; but Mr. Weldon consulted him with a view to see whether or not his wife ought to be put in an asylum. Whether at that time it had entered into Dr. Winslow's mind, as it did afterwards, that if Mrs. Weldon was sent to an asylum she might be sent to his, did not appear. But he was, in fact, the registered proprietor of an asylum, and when asked by Mr. Weldon what asylum it would be better to send her to, he suggested his own. He, however, went to see Mrs. Weldon on that day, and he then wrote the letter complained of as a libel:—"It is my duty to inform you that it is imperative that immediate steps to secure her should be taken." Mr. Weldon then gave him *carte blanche* to make any arrangement, necessary for the purpose. It was then discussed to what asylum she should be sent, and it was arranged she should be sent to his private asylum, and the terms were settled at 500 guineas a year. Now that, said Mr. Justice Manisty, is a most important fact, and it has a bearing on the whole cases both as regards the authority to take her, and also as to the privilege for the libel. If Dr. Winslow had it at all in his mind that she should be taken to his asylum, he ought to have told Mr. Weldon at once—"I can take no part in these proceedings. I can take no part in obtaining the certificates, or in getting the order. You must get some one else to act in the matter." But, at all events, when it was arranged that she should be taken to his asylum he was bound to take no part whatever in the matter. He, however, had instructions from Mr. Weldon to do whatever was necessary in the matter, and was paid thirty guineas for his own fees and those of the other medical men who were to act in the matter, and whom he himself

selected—Dr. Wynn and Dr. Temple—he selecting the medical men who were to go to see Mrs. Weldon and certify whether she ought to be removed. It was most improper. It was wrong that the proprietor of a lunatic asylum should interfere in any way in selecting the medical men who were to give the certificates, and in getting the particulars of the "statement," a most important document, required by the Legislature for the protection of persons supposed to be insane, when he should have nothing to do with it, and it ought to be perfectly independent and absolutely free from all suspicion of his interference. It was a great power which was intrusted to persons in that position—to take the preliminary steps for sending a person to a lunatic asylum, and the Legislature had provided certain safeguards. But what took place in this case? Dr. Winslow saw these medical men, who ought to have been two independent medical men, qualified to form an independent judgment on the case, and they went to the house and contrived to have an interview with the lady, and they first saw her together, and then one stepped out and the other remained to make what was to be called a "separate and independent examination," and then he stepped out and the other came back to make his separate and independent examination of the lady. This was supposed to satisfy the requisitions of the statute that the medical men should be absolutely independent, and each exercise an independent judgment, and have nothing to do with the proprietor of the lunatic asylum to which the person is to be sent. The medical men having had what they called their "separate examinations" returned; and it was suggested that Mr. Weldon should give the order, but it was found that he could hardly do so, as he had not seen her for three years, and the law evidently intended that the order should be given by some one who knew the person; and then it was suggested that Sir H. de Bathe should go and see her, and take the responsibility of the order, and Dr. Winslow prepared the "particulars of the statement," and sent them to him. The learned Judge said this was what the Legislature looked upon as a most important document, for it was to state the facts showing that the person in question was in a condition

which rendered it fit and proper that she should be removed to an asylum; and it was revolting to one's sense of right that merely because the person had some strange or eccentric ideas therefore she was to be shut up for life. But that took place on the evening of the same day on which Dr. Forbes Winslow had written that it was "imperative" that this lady should be secured, when it did not appear that she had done a single act to render it necessary to shut her up. And then, upon these authorities so obtained, they attempted to take her; but she escaped, and from that day, the 13th April, 1878, to the present time in 1884—there had been no further attempt to confine her, though if at that time she was a dangerous lunatic it was their bounden duty to take proper measures for her protection. Yet ever since then, down to the present time, she had remained at large, mistress of her own liberty; and though she may have caused annoyance to some persons by bringing actions, she said that she was determined to bring her case before the public and endeavour to obtain redress, and nothing had been shown to justify any steps for shutting her up. Then came the question, Is there, upon these facts, anything that could be left to the jury to show that the libel was written maliciously—that is, from some bad motive, and that so it was not privileged, but was a false and malicious libel? It seemed to have been supposed at the trial that the truth was not material; but if the libel were false, that would be some evidence that it was malicious. Where the occasion is privileged, as the learned Judge at the trial held here, it is necessary to show malice, and falsehood may be evidence of it. Was there, then, evidence of malice? The Court held there was, and on that point they gave judgment that there must be a new trial. It was not the case of a medical man merely giving an honest opinion. The defendant was the registered proprietor of an asylum—the asylum to which the lady was to be sent. He was the person responsible for the management, and in whose care and custody the lady would be. All the facts and circumstances in the case were evidence of malice—that is, of some indirect motive. All these proceedings took

place upon the same day, on the Sunday. He had written that it was "imperative" that "immediate steps" should be taken to secure her. But what was the difference between the condition of the lady on that day and any other day during the previous five years? It was not any mere harmless delusion or eccentricity which required a person to be confined in an asylum. The question was whether in this case there was any sufficient cause for immediate removal to an asylum. All these circumstances were for the jury to consider. The learned Judge said he "could not suppose that Dr. Winslow would be actuated by sordid motives." But it was not for him to decide that; it was for the jury to decide it. Having regard for the position of Dr. Winslow and all the circumstances of the case, it was for the jury to decide whether he acted honestly or with some indirect motive. All the proceedings under the statutes must be conducted independently of any proprietor of an asylum. And if this case goes to a second trial (as, the Court said, if it depends on us, it will), the question will be open whether, under the circumstances, these orders and certificates were of any validity and any protection to anyone at all. That will have to be decided at the second trial; and it may be a very serious question whether the proprietor of any asylum can act in any way in the matter, and then set up the order and certificates so obtained. But on the other question, as to the libel, there can be no doubt there was evidence which ought to have been left to the jury that the libel was written maliciously in the legal sense—that is, from some indirect or improper motive, and therefore, in the opinion of the Court there must be a new trial.

THE LATE MR. J. P. BENJAMIN.

It is less than a year since we noticed the retirement of Mr. Benjamin from practice, owing to ill-health (6 L. N. 286). Now the cable despatches inform us of his death, which took place at his apartments in the Avenue Jena, Paris.

Mr. Benjamin was born in St. Croix, a Danish West India island, in 1811, of Eng-

lish parents of the Jewish faith, who emigrated in 1816 to Wilmington, N. C., where his father became naturalized as an American citizen, the son remaining a native born subject of England. He entered Yale College in 1825, but left, without graduating, in 1828, when he went to New Orleans, and was admitted to the Bar in 1832. He entered prominently into politics, originally as a whig, but on the merging of that party into the "Know Nothing," or native American party, he attached himself to the democratic party. He was elected to the United States Senate in 1852, and re-elected in 1858. On December 31, 1860, in a speech to the Senate, he avowed his adhesion to the State of Louisiana, which had seceded from the Union, and he at once withdrew from the Senate and returned to New Orleans. He was then called by Jefferson Davis, who had just been elected President of the Southern Confederacy, to join the Cabinet as Attorney-General. To the duties of this office were added those of Acting Secretary of War during a temporary vacancy in that office. On the appointment of a permanent Secretary of War, the Cabinet was reorganized, and Mr. Benjamin was made Secretary of State, retaining that office and the confidence of the President until the overthrow of the Confederacy. He then escaped the pursuit of the Northern troops, and succeeded in reaching Nassau, New Providence, whence he sailed for England, where he arrived in September, 1865. He was called to the English Bar in June, 1866, established himself in London and rose to successful practice, receiving a silk gown in June, 1872. In 1868 he published the first, and in 1873 the second edition of a "Treatise on the Law of Sale of Personal Property." By the fall of Overend & Gurney Mr. Benjamin lost the sum of £3,000—all that he possessed on earth—and had to cast about for something to do until his book on the "Sale of Personal Property" was completed. Having a wife and daughter to maintain in Paris and himself in London, he prepared, with that easy adaptability to circumstances which had distinguished him throughout the whole of his versatile and many sided career, to sustain himself for awhile by writing for the press. It was under these circumstances that he

temporarily joined the staff of the *Daily Telegraph* and contributed for many months a series of brilliant leading articles to the columns of that journal. The publication of his book upon "Personal Property" brought him immediately into notice. Shortly after its publication Baron Martin, when taking his seat one morning upon the bench, asked to have Mr. Benjamin's work handed to him. "Never heard of it, My Lord," was the answer of the chief clerk. "Never heard of it!" ejaculated Sir Samuel Martin; "mind that I never take my seat here again without that book by my side." It was soon after this date that, speaking to one of Mr. Benjamin's most intimate friends, the same able judge pronounced the new ornament of the English Bar to be "the greatest advocate that he had heard since Scarlett." It is doubtful, however, whether Mr. Benjamin would ever have been so effective before a British jury or in the atmosphere where Scarlett was omnipotent, as he was in the Appeal Courts of the House of Lords and the Privy Council. To these courts he confined himself exclusively toward the end of his English career.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, April 29, 1884.

Before JOHNSON, J.

GERBIE v. BESSETTE et al.

Capias, Malicious Issue of—Damages.

The defendants bought up some debts and caused the arrest of the plaintiff under a capias for the purpose of detaining his person and getting possession of certain papers. Held, an abuse of the process of the Court, and that exemplary damages should be awarded.

PER CURIAM. The plaintiff sues Bessette, a broker, and Vandevliet, a contractor, jointly and severally, for \$15,000 damages for having had him arrested under a writ of capias.

Gerbie, the plaintiff, was secretary to a Mr. Legru who came out here as agent of some French capitalists, and he had had some business relations with the defendant Bessette, and having occasion to go to France,

had got as far as New York when he was arrested there by Bessette. In order to get his liberty he had to send back his secretary to Montreal to bring some necessary papers, which the latter procured, and was on his way back to New York with them when he was arrested on the train at St. Lambert soon after leaving the railway station here, at the suit of Vandevliet, acting, as it is alleged, in concert with Bessette—the two having bought up three small accounts due by Gerbie, Vandevliet making the necessary affidavit. The plaintiff had offered to pay the debt and costs before the train left; but this offer was refused, and the train left the station with the bailiff on board. Before the arrest at St. Lambert the plaintiff again offered to pay the debt and costs, but met with a second refusal, and the object of the party or parties making the arrest was openly avowed to be not to get payment of the debt, but to get possession of the plaintiff's person and of his papers; and he was brought back to Montreal and gave bail, and the *capias* was subsequently quashed.

Bessette pleads (besides some irrelevant matter, such as Vandevliet's being justified in causing the arrest, and Gerbie aiding Legru to escape from his creditors to France) what merely amounts to a denial of his complicity with Vandevliet in taking the proceedings against Gerbie.

Vandevliet answers the action by setting up first that the judgment setting aside the *capias* was susceptible of appeal, and therefore there was no right of action when it was brought; but this would be a temporary exception merely, and would not give rise to a dismissal of the action, which is asked by the conclusion. The rest of Vandevliet's plea simply means that he had probable cause for issuing the *capias*.

I think it is impossible to read the evidence of Bessette and Vandevliet without an inevitable conclusion that the former was the prime mover in the whole affair. The other may have had some claim against Legru also. He swears he had—but what his claim was does not appear. Bessette was the party principally interested, if not the only party interested in preventing the papers which Gerbie carried from reaching Legru—an in-

terest that he may have had in common with Vandevliet, but certainly one that he had himself whether along with the other or not. The office of a judge would be merely mechanical if he shut his eyes to the inevitable inductions of common sense from proved facts, and I feel no doubt whatever that Bessette was at the bottom of the arrest of Gerbie, and that Vandevliet carried out his friend's and his own purpose by buying up petty claims against Gerbie, and then swearing that he was likely to lose them if he did not get a *capias*,—a shameful abuse of the process of the court, and an evidence of malice in both of them as plain as any evidence can be. On this subject I would refer the counsel to Sourdats, No. 152.

I am of opinion, then, that the plaintiff has made out a very strong case against both of the defendants. The damages, besides being necessary as arising from the commission of legal wrong, should in such a case be exemplary. The judgment of the court is that the defendants jointly and severally be adjudged to pay to the plaintiff \$500 and costs of suit.

I had omitted to mention that a motion was made by the defendants' counsel to set aside the enquête. That point has been settled in the present case by the judgment rendered in the Practice Court, which I have no power to disturb, and no disposition to disturb, if I had the power.

Judgment for plaintiff.

Mousseau, Archambault & Lafontaine, for the plaintiff.

Prefontaine & Co., for the defendants.

SUPERIOR COURT.

MONTREAL, April 29, 1884.

Before J. O'BRIEN, J.

RBA v. KERR.

Dissolution of Sale for non-payment of price
—C. C. 1543—*Payment by Note.*

The fact that the buyer gave a note for the price of goods, which note was discounted at a bank by the seller, does not affect the right of the latter to dissolve the sale when the note is not paid at maturity.

PER CURIAM. This is a *saisie conservatoire* of a number of pairs of boots sold by the

plaintiff to the defendant, and founded upon Art. 1543 C. C., reproducing the article of the old Custom of Paris; and the prayer of the action is to have the defendant condemned to restore the things, or in default pay the price.

The defendant offers a confession of judgment for the price; but resists the right of seizure, on the ground that the goods have been unpacked and mixed with his other merchandize; and further he alleges that he gave a note for the price (which indeed is also alleged in the declaration), and that such note having been discounted at a bank, though subsequently paid by the plaintiff, the latter is merely *subrogé* to the bank.

There is really not a word to be said about such a case as this. There is an admission of facts, and there is the evidence of a witness as to the state of the goods being the same as when sold. The idea of the plaintiff's right being limited to the extent of the rights of the discounter of the note is inadmissible. It would be of little use to merchants to have their safes full of notes, if by raising money on them, which they subsequently had to repay, they were exposed to lose their recourse against purchasers of their wares. The judgment will be for the plaintiff, maintaining the seizure and granting the other conclusions.

Busteed & White for the plaintiff.

Cooke & Brooke for the defendant.

CIRCUIT COURT.

MONTREAL, 30 avril 1884.

Coram LORANGER, J.

LA CORPORATION DE LA PAROISSE DE LA POINTE AUX TREMBLES, Appelante, v. LA CORPORATION DU COMTÉ D'HOCHELAGA, Intimée.

Procédure—Conseil de Comté—Appel.

JUGE: 1. *Que l'appel pris à la Cour de Circuit de la décision donnée par un conseil de comté, relativement à son procès-verbal, fait et homologué sous l'autorité du conseil, doit être porté contre les intéressés, requérant tel procès-verbal, et non contre la corporation de comté, à moins que le conseil n'ait agi, proprio motu.*

2. *Que dans l'espèce ce sont les intéressés qui ont signé la requête demandant l'action du conseil, qui auraient dû être mis en cause sur l'appel, et non la corporation du comté, qui n'aurait fait qu'exercer par son conseil des fonctions judiciaires.*

PER CURIAM. Il s'agit de l'appel d'une décision rendue par le conseil du comté d'Hochelaga homologuant le procès-verbal de Joe Marion, écuyer, surintendant nommé par l'intimée, pour faire droit à la requête de certains propriétaires des paroisses de la Pointe aux Trembles et de la Rivière des Prairies, demandant des changements aux procès-verbaux qui règlent l'entretien d'un chemin qui relie ces deux paroisses. La requête signée par un grand nombre des intéressés de ces deux localités, situées dans le même comté, a été soumise en la manière ordinaire au conseil de comté qui a nommé un officier pour faire la visite des lieux, et lorsque son rapport fut soumis pour homologation, les intéressés furent entendus contradictoirement. Les minutes de la séance démontrent que les opposants à l'homologation étaient représentés par avocat, mais les noms ne sont pas donnés, et nulle opposition écrite n'a été produite; il en est de même pour les intéressés favorables à l'homologation; ils sont également représentés par avocats, mais leurs noms ne sont pas donnés. Il faut présumer que se sont les requérants qui ont provoqué l'action du conseil et la nomination du surintendant. Le conseil de comté a maintenu le procès-verbal, et maintenant la corporation de la Pointe aux Trembles qui se dit lésée par cette décision, en appelle et prend le bref en son nom contre la corporation du comté d'Hochelaga.

L'intimé demande par motion le renvoi de cet appel pour entr'autres raisons les suivantes:

1o. Parce que le bref n'a pas été pris entre les parties concernées au litige devant le conseil de comté; 2o. Parce que le cautionnement est insuffisant.

Le premier grief, et le plus important est formulé de la manière suivante dans la motion: "Parce que la corporation du comté d'Hochelaga, assignée comme intimée, n'était pas partie intéressée au procès-verbal, mais a agi seulement comme tribunal statuant et adjugeant sur le mérite du procès-verbal; que les intéressés sont les contribuables qui ont signé la requête demandant l'action du conseil, et sont les seuls qui devaient être mis en cause sur le présent appel, et non la corporation du comté qui n'aurait comme dit ci-dessus, fait qu'exercer par son conseil, des fonctions judiciaires."

L'art. du C. M. qui régit la matière est l'art. 106, qui déclare qu'une copie du bref doit être signifiée à l'intimée ou à son procureur, et au juge ou l'un des juges de paix qui ont rendu le jugement, ou à leur greffier, ou au bureau du conseil s'il s'agit d'une décision d'un conseil de comté, ou au secrétaire du bureau des délégués, si l'appel est d'une décision de ce bureau.

L'article se sert de la conjonctive et en parlant de la signification du bref, elle doit être faite à l'intimé et au juge ou au conseil suivant le cas. Quel est l'intimé dans le cas où comme dans l'espèce actuel la corporation n'a pas été partie au litige nominativement? Evidemment celui qui a obtenu gain de cause devant le tribunal. La signification du bref se fait au conseil comme au juge pour les fins de la transmission des papiers, ainsi que l'indiquent suffisamment l'art. 1068 qui règle le mode et les délais de cette transmission.

Le conseil n'a rempli que des fonctions judiciaires qui n'engagent en aucune manière sa responsabilité corporative. Il ne faut oublier que la question soumise à sa considération, était d'un intérêt purement local et n'affectait dans ses résultats que les biens des parties immédiatement intéressées; et l'intervention du conseil du comté n'est devenue nécessaire, que par le seul fait que la loi ne reconnaît pas d'autre tribunal que le sien pour régler les différends de cette nature. On conçoit que si le conseil du comté avait agi *proprio motu* et nommé lui-même le surintendant, le cas serait différent, car alors il serait censé avoir agi dans l'intérêt général du comté; dans ce cas il aurait été la partie requérante.

La corporation du conseil du comté ne peut poursuivre et être poursuivie que pour des fins qui intéressent le comté généralement, et le code ne reconnaît aucun cas d'intérêt purement local qui engage sa responsabilité. La division des pouvoirs et des attributions des corporations locales et des corporations de comté, de même que leurs obligations, est parfaitement définie par le code. Il en est de même des conseils des mêmes corporations dont la juridiction pour être concurrente dans certains cas, ne laisse pas cependant d'être bien distincte quand il s'agit des intérêts généraux du comté ou de questions qui intéressent des contribuables de différentes paroisses d'un même comté. Dans ce dernier cas, le conseil de comté est mis en requisition comme tribunal. Tel est le sens des art. 1063-1073. On a paru confondre le conseil de comté avec la corporation même, ce qui est une erreur, puisque la corporation est sans intérêt comme sans pouvoir sur la question en litige.

Je suis donc d'avis que les seuls intimés sur le présent appel étant les requérants qui ont réussi à faire homologuer le procès-verbal. La même question a été jugée dans

ce sens par l'honorable juge Chagnon, dont on trouvera le jugement élaboré dans le 7e vol. de la Revue Légale.

L'honorable juge Bélanger, *in re Cantwell v. La corporation du comté de Huntingdon*, rapportée à la page 263 du 23e Jurist, paraît avoir jugé dans le sens contraire, en décidant qu'il est pas nécessaire que le bref d'appel d'une décision d'un bureau de délégués, soit signifié aux parties qui ont requis le procès-verbal. Le savant juge semble d'opinion que le mot *intimé* doit s'entendre des causes intentées devant les juges de paix où il y a deux parties régulièrement mises en litige. Ce jugement paraît appuyé sur une décision analogue qui aurait été rendue quelque temps auparavant par son honneur le regretté juge Wilfrid Dorion dans la cause *Huot v. La corporation du comté de Chambly*. Cette cause n'a pas été rapportée, et en consultant le dossier et le jugement on s'aperçoit que la citation qui en a été faite au tribunal était erronée. Le point avait été soulevé, il est vrai, par la plaidoirie écrite, mais il a été abandonné à l'audience.

Le jugement constate que l'intimée n'a pas comparu à l'audition. Les parties étaient entendues sans doute pour faire infirmer la décision du conseil. Le précédent de Huot est donc sous les circonstances sans importance.

Malgré le respect que je professe pour l'opinion du savant juge *in re Cantwell*, je ne puis partager sa manière d'interpréter l'art. 1067. Il y a suivant l'art. 1061 appel à la Cour de Circuit de tout jugement rendu devant les juges de paix en vertu des dispositions du C. M. et des décisions du conseil de comté, tout procès-verbal homologué. Dans les deux cas le dossier doit être transmis de la même manière; il faut pour cela que le bref leur soit signifié, et c'est tout ce que l'art. 1067 qui ordonne cette signification, peut avoir en vue. Il est vrai que la procédure originaire devant les juges de paix est différente de celle qui est suivie devant le conseil du comté. Dans le premier cas il y a toujours deux parties au litige, tandis que dans le second il n'y en a souvent, comme dans le cas actuel, qu'une seule, c'est-à-dire les intéressés qui demandent le procès-verbal,—mais on ne doit pas oublier que le litige peut être requis et continué entre d'autres parties après l'homologation. Quiconque se trouve lésé par la décision du conseil, a droit d'appel, même s'il n'était pas partie au litige auparavant.

C'est ce qui a été fait dans le cas actuel. La corporation de la Pointe aux Trembles, qui n'était pas en cause comme corporation, intervient dans l'intérêt de ses municipaux qu'elle croit lésés par la décision dont est appel, et personne ne lui nie ce droit.

Mais il ne suit pas de là, que les véritables intéressés, savoir les requérants qui ont demandé l'homologation, doivent s'effacer du

dossier pour laisser le conseil du comté plaider en leur lieu et place. Ce sont eux qui ont provoqué l'appel et c'est avec eux qu'il doit être continué.

L'appelant se plaint que l'intimé aurait attaqué le bref par voie de motion au lieu de le faire par exception à la forme. Je dois avouer que la procédure suivie en pareil cas, a toujours été à ma connaissance la contestation régulière; mais l'art. 1071 autorise la procédure adoptée dans la présente instance.

La motion de l'intimé est donc régulière. J'ai pensé qu'il serait peut-être possible de suppléer à l'insuffisance de la procédure de l'appelante en ordonnant que les véritables intimés soient mis en cause, et appuyant sur l'article 1071 qui semblent reconnaître que l'appel en semblable matière, n'est en réalité qu'un nouveau procès, puisqu'il est loisible aux parties de faire entendre de nouveaux témoins. Mais d'un autre côté la révision de la division du conseil devait être amendée dans des délais fixes et déterminés par la loi. Ces délais sont maintenant expirés, et l'on peut se demander si la cour a le pouvoir de les faire revivre pour permettre à la partie en défaut de refaire sa position. Je crois donc qu'il est plus sage de laisser la loi suivre son cours.

La motion de l'intimé doit être accordée et le bref d'appel cassé et annulé tel que demandé avec dépens.

Préfontaine & Lafontaine, avocats de l'appelante.

Prévost & Bastien, avocats de l'intimé.

BELT v. LAWES.

The following summary of the Belt case is given in the *Spectator* :—

The old comment on English law, that it is a luxury to live under it, and a very costly one, is strongly illustrated by the ultimate result of the Belt case. The history of that case is, after all, both short and simple. Mr. C. B. Lawes, writer and sculptor, described Mr. R. Belt, sculptor, in print in words which signified that he was an artistic impostor, who obtained large orders for works the merit of which was due to other men. The charge would probably have been forgotten by the public in a week, but Mr. Belt had, of course, his right of action, and apprehending, as he says, that he might be professionally ruined by quiescence, he used it. He brought his action for libel, and after a huge trial, which moved the whole social world, the jury gave him a verdict and £5,000 damages, the verdict carrying the unusually

heavy costs. Outsiders would, of course, imagine that this was victory for Mr. Belt, and congratulate him on his courage, but that gentleman and his solicitors knew that there was another side to the matter. So heavy had the expenses been that Mr. Belt had been compelled, as he says, in a letter sent to the journals, to accept assistance from his friends, and to incur liabilities to his solicitors apparently for money actually out of pocket, to an extent at this stage of the proceedings which we can only guess, but which ultimately, Mr. Belt says, reached nearly to the sum of £5,000, due to his advisers alone. When, therefore, during the hearing of an application for a new trial, the Lord Chief Justice Coleridge and two of his colleagues suggested that if Mr. Lawes paid £500 and costs, proceedings should terminate, Mr. Belt accepted that compromise. He would have vindicated himself, as far as obtaining a verdict went, and he would have only voluntary costs to pay; and like a wise man, he forced himself to be content with a little, lest he should ultimately have nothing. Mr. Lawes, however, probably under an idea that public opinion was with him, and would ultimately make itself felt, rejected the compromise, and brought a regular appeal, which ended in a unanimous decision by three judges that the verdict must be upheld, and that Mr. Lawes must pay £5,000 damages, and £8,000 costs. It was considered vain to appeal to the Lords against a judgment so unanimous, and Mr. Lawes offered a compromise. He would pay £5,000 down in forty-eight hours, if that sum were accepted in full of all demands; and if that were rejected, he would go into the Bankruptcy Court. Mr. Belt's solicitors very naturally advised the acceptance of this offer; but Mr. Belt refused, saying that the sum promised, though it would repay his solicitors, would not repay his friends who had advanced money, and that he found himself bound to repay them first of all. Mr. Lawes consequently filed his petition in bankruptcy, and it appears from Mr. Belt's published letter to his solicitors, that he foresees a necessity for the same step. "If," he says, "my creditors elect to force me into bankruptcy, it will be only one more knot in the lash of persecution to which I have been subjected." In short, judging from Mr. Lawes' action and from Mr. Belt's words, which he himself sends to the newspapers, the "Belt case" has ended in the pecuniary ruin of plaintiff and defendant and the exasperation of the lawyers, who do not this time find the oyster as satisfying as usual.

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CREMATION IN ENGLAND.

In *Regina v. Price*, reported in the April number of the Law Journal Reports, Mr. Justice Stephen expresses the opinion that cremation *per se* is not illegal. In a previous case (*Williams v. Williams*) Mr. Justice Kay, without deciding the question formally, intimated that in his opinion the practice was not legal according to the law of England. Mr. Justice Stephen, whose opinion has great weight, after full consideration, has arrived at a different conclusion.

The *Law Journal* (April 26, 1884,) says: "The drift of Mr. Justice Stephen's argument may be very shortly stated. In the first place, he says that there is no authority for the proposition contended for by the prosecution, which he has been able to discover after the fullest examination. He admits that Courts have sometimes declared acts to be misdemeanors which have never previously been decided to be so, but suggests that those cases all 'involved great public mischief or moral scandal.' "I do not think," he adds, "that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanor at common law." This view is supported by reference to the Anatomy Act, which appears to him to show that burial was not the only mode of disposing of bodies recognized by the Legislature. His decision, therefore, is that cremation *per se* is not illegal, and is not the subject of an indictment unless done so as to amount to a public nuisance."

Since the decision of Mr. Justice Stephen the Cremation Society have issued the following conditions on which the employment of the Crematorium will be permitted by the council:—

I. An application in writing must be made by the friends or executors of the deceased—unless it has been made by the deceased

person himself during life—stating that it was the wish of the deceased to be cremated after death.

II. A certificate must be sent in by one qualified medical man at least, who attended the deceased until the time of death, unhesitatingly stating that the cause of death was natural, and what that cause was.

III. If no medical man attended during the illness, an autopsy must be made by a medical officer appointed by the society, or no cremation can take place.

LAW AND LAWYERS IN BELGIUM.

An English lawyer contributes to the *Law Journal* (London) some notes of a recent visit to Belgium. He praises the advocates' costume. "The robes," he says, "are far superior to our own. The gowns very neat, clean, and fastened in front so as to lie close to the neck instead of falling away from the shoulders in awkward slovenliness, as here; adorned with the pretty white ermine tufts instead of the ugly cowl, and covering the body of the advocate, like our judges' robes, not leaving exposed to view that remarkable variety of shirt front and waistcoat which characterize without adorning the English bar."

The salaries paid to the judges are wonderfully small. The usual stipend is £300 a year, or \$1500, and the highest judge in the country gets only £540, or less than one-half what our chief justices receive.

The following passage might have been written of a visit to the province of Quebec: "The thought occurs, As these good people have a Code, what do they want with volumes of reports? We had business in hand, in fact a commission, and some *avocats* of very great intelligence gave us plenty of law—pages and pages of it. They were asked, 'Was there anything in the Code about it?' 'Well, yes, two lines that perhaps had some bearing on it.' 'Where, then, does all this learning come from?' 'Why, from reported cases to be sure.' A lesson to codifiers. But, of course, a Code can only propound general principles evolved from past experience. But legal decisions are evoked by the infinite variety of mundane circumstances, which are exactly what the wisest can neither foresee nor guard against."

BUSINESS IN APPEAL.

The actual reduction of the roll effected by the extra terms in Montreal is rather disappointing. The May term commenced with 78 appeal cases inscribed for hearing. In May of last year the number of inscriptions was 99, while in May, 1882, the number was 95. The actual gain on 1882 is, therefore, only 17, which, it is to be feared, will be almost lost when the September list appears, as the progress during the present term has been unusually slow.

THE LATE CHARLES O'CONOR.

Charles O'Connor, a distinguished lawyer of New York, died May 2, aged 80. The daily journals are full of eulogiums on the deceased, but the *Albany Law Journal* is less glowing. Our contemporary says: "He was a man of strong mental endowments, and perhaps for many years would have been named as the leader of the American bar, but his career has been disfigured by a bad temper, cold manners, and some unseemly squabbles. He will be longest and most unpleasantly remembered for his attack on the Court of Appeals of this State. He was a man of great learning, but there are a score in the country at present his equal. He was a powerful advocate, but he cannot be ranked with such geniuses as Webster and Choate."

NOTES OF CASES.**COURT OF QUEEN'S BENCH.**

MONTREAL, January 23, 1884.

DORION, C.J., RAMSAY, TREBBIER, BABY, JJ.

PRENTICE (deft. below) Appellant, and MACDOUGALL (plff. below), Respondent.

Partnership—Partition—Warranty.

Art. 1507 C.C. does not apply to partition between co-partners. Where two partners made a partition of shares forming a portion of the partnership property, and one was evicted from his share, the other partner was held not liable for more than the value of the share at the time of the partition, i. e., his obligation was merely to equalize the value of the portions, without a new partition.

RAMSAY, J. This is an action to account brought by one of the members of a partnership against his co-partner after the dissolution of the partnership by mutual consent. At first there appears to have been a number of questions at issue between the parties, but the only one submitted for our consideration is as to the disposal of 160 shares of the Silver Islet Company. Apart from the Silver Islet transaction, the respondent admitted his account was overdrawn by the amount of \$7,296.01.

Before proceeding to examine into the only question with which we have to deal, it is necessary to say that by the articles of partnership the appellant was to have two-thirds of the profits of the general brokerage business, and three-fourths of the profits resulting from the sale of mines and mineral rights, and from the formation of companies in Canada, the United States and Europe. After some preliminary details, which are wholly unimportant as regards the issue before us, the appellant and respondent, as co-partners, obtained on the 18th April, 1870, the right to purchase the whole property of the Montreal Mining Company (really the Silver Islet property) for \$225,000, this right to purchase being open till the 1st June, 1870. As the right to purchase for so short a time was insufficient to allow of the negotiations contemplated by Prentice in England, the firm of Prentice & Macdougall on the 6th May obtained from The Montreal Mining Company the right to an extension of time till the 1st September following, by their paying the company \$2,000, or giving an approved note for \$2,000, to be forfeited to the company in case Prentice & Macdougall should fail to accept and pay for the property according to agreement. In order to procure the \$2,000 necessary for this deposit Prentice turned to a friend in London, Mr. McEwan, and obtained the necessary funds from him, on the promise that he should share equally with Prentice & Macdougall in the profits of the transaction. The deposit was duly made, and on the 25th May the Montreal Mining Company made a bond in favour of Prentice alone. When it became necessary to pay up the balance of the first instalment (\$48,000) under the bond on the 1st of September, 1870, Prentice

tice & Macdougall were unable to provide the money, which was furnished by one Sibley, of New York. In exchange for this Prentice conveyed to him "all and singular the within written bond," that is, the bond from the Montreal Mining Company to Prentice, by a memorandum of sale written on a copy of the notarial bond by the Montreal Mining Company to Prentice. This memorandum was extended and made more full by a deed called an indenture, purporting to be made on the same day between Prentice and Sibley. By this deed it appears that Sibley was to hold nine-tenths of the property in trust for his friends and one-tenth or 160 shares for Prentice. By another bond of indenture we learn that the persons for whom Sibley was acting when he treated with Prentice, besides himself were E. B. Ward, Edward Learned, Peleg Hall and C. A. Trowbridge. We also learn that Prentice was to have his one-tenth, that is 160 shares. These shares were transferred to Prentice's name, and he got certificates for them. This last indenture was executed on the 2nd November, 1870. In December of that year, Mr. Learned wished to acquire 80 shares of the 160 shares held by Prentice, and Prentice sold them to him for \$9,000. In all these transactions it seems the promises to McEwan were overlooked by Prentice and Macdougall, and he was getting restive under this neglect. Prentice and Macdougall then agreed that Macdougall's share should be 40 shares, and in order to put the remaining 40 shares out of the reach of Mr. McEwan's litigation, the whole 80 shares were on the 3rd March, 1871, assigned to Macdougall, on the understanding that 40 shares should be passed over into the name of Mr. Ashworth, in trust for Miss Auldjo, Prentice's sister-in-law, but really to be held for Prentice. In 1871 Mr. McEwan brought his action in the United States against Prentice and Macdougall, and attached the whole 80 shares which had been left standing in Prentice's name notwithstanding the transfer. In this suit of McEwan, Prentice & Macdougall succumbed, and the whole 80 shares were lost save eight which McEwan abandoned to avoid the risk of an appeal. Now Prentice's pretension is that he owes Macdougall

an account of the whole 160 shares, because although they stood in Prentice's name, they were undoubtedly the property of the firm, that is three-fourths were Prentice's and one-fourth Macdougall's, that by the transactions of the firm the whole of these shares were lost save the price of the 80 sold to Learned for \$9,000, and the eight shares given back by McEwan, and that Macdougall has, therefore, only a right to be credited for one-fourth of \$9,000, and two shares of the eight or their value; that the one-fourth of \$9,000 is \$2,250, and the value of the two shares *nil*, so that plaintiff's *débat* is unfounded, and, moreover he is entitled to nothing, for his account is greatly overdrawn, and that the *reliquat* is due by Macdougall and not to him.

There is really little difference between the parties as to the main facts, and, to avoid length, I shall advert to the evidence where it is conflicting in setting out Mr. Macdougall's pretensions, which are perfectly clear. He contends that he was no party to the arrangement in London, by which Prentice promised one-half of the profits to McEwan; that in reality, he had, by special arrangement with Prentice, a right to half of the profits of this particular transaction; that for certain reasons of convenience the whole 160 shares got into Prentice's name; that Prentice sold 80 shares, his own half, for an inadequate price, namely for \$9,000; that subsequently Macdougall agreed to take 40 shares to terminate a suit between him and Prentice; that Prentice agreed to take the 80 shares he had sold to his own account, and that he had given Macdougall, by a deed of sale *implying warranty*, for his share, a certain forty shares, of which Macdougall had been deprived by the fault of Prentice. Consequently he concludes that Prentice is his *garant* for these forty shares, and that he should, therefore, give him over the eight shares returned by McEwan and pay him for thirty-two or pay him for the whole forty shares. The court below adopted respondent's view and decided that appellant owed respondent forty shares or the value, fixed at \$80,000, less the *reliquat de compte*, which, apart from this matter, is in favour of the defendant to the amount of \$16,188.51,

leaving a balance due by the appellant to respondent of \$63,811.49, to which he is condemned unless he gives the respondent forty shares within fifteen days.

It is manifest that whatever view may be taken of this case the judgment is exaggerated. If appellant is *garant* of respondent for the forty shares transferred to him by Prentice, the least we can say is that Macdougall is *garant* in the measure of his interest of the other forty shares sold by Prentice to Macdougall for the account of Miss Auldjo. But in truth the deed of the 3rd March is not a warranty deed in the sense of the respondent's pretention, or a deed of sale. It is an assignment of all Prentice's rights in the forty shares, and it is made with special reference to McEwan's claim for which Macdougall undertakes to guarantee Prentice proportionally. This will appear by a letter of guarantee from Macdougall to Prentice, of the same date, which is in these words:—

"63 Wall Street, New York, 3rd March, 1871, Edward A. Prentice, Esquire.

"DEAR SIR,—In consideration of your assignment to me this day of your remaining interest in the property formerly belonging to the Montreal Mining Co., and now held by Alex. H. Sibley and other trustees, I hereby agree that any interest therein to the extent of one-half of that conveyed by the said assignment, or one-fortieth of the whole interest originally held by you, shall be liable in said proportion for any damages which may result to you by reason of any suit which Mr. Alex. McEwan, of London, England, may institute against you for failure to secure *his interest*, or any expenses which have been already incurred in the negotiation of the sale of the property by you.

"Yours truly,

"(Signed,) H. T. MACDOUGALL."

It is strange, after reciting this letter textually, to find respondent saying in his *factum*, "This letter was given without consideration, at a time when plaintiff knew nothing whatever of McEwan's claim." Mr. Macdougall may not have known the full extent of the firm's liability to McEwan, but it is evident by this very letter that he knew there was something, and it is difficult

to believe from his correspondence with Prentice in 1870 that he did not know from the beginning that Prentice was getting financial assistance in the matter, which had to be paid somehow. Again, if taken with the articles of partnership it would seem, that the assignment was simply a mode of giving Macdougall his proportion of the 160 shares. As the learned counsel for the respondent has pointedly referred to Art. 1507, I shall endeavour to put the argument technically. *Partage* is not *vente*. It is determinative of the right of property and not translatif. "Pareillement, lorsque plusieurs personnes ont été conjointement légataires d'un héritage, ou lorsqu'elles l'ont acheté en commun, et que par la suite elles le partagent, chacun est censé avoir été seul légataire ou seul acheteur de ce qui est tombé dans son lot, et n'avoir été légataire ni acheteur de rien de ce qui est tombé dans les autres lots." "Cela a lieu quoique le partage ait été fait avec retour en deniers ou en rente. * * * "Il est évident, suivant ces principes que le partage est un acte qui n'a aucun rapport avec le contrat d'échange, et encore moins avec le contrat de vente, soit qu'il soit fait sans retour, soit avec retour en deniers; car, suivant ces principes, le partage n'est point un titre d'acquisition; je n'acquies proprement rien par le partage que je fais avec mes cohéritiers ou autres copropriétaires; et tout l'effet du partage se réduit à rendre déterminé à de certaines choses le droit que j'avais, qui était auparavant indéterminé." Pothier, *vente*, No. 630. Laurent tries to show that this opinion of Pothier is erroneous, and that it is not in accordance with Roman law. He has for him the great name of Dumoulin, but I think he is unsuccessful. He goes back to the feudal law and contends that it was declared by the lawyers, who were hostile to mutation fines, that *partage* was not *équipollent à vente*, in order to avoid the payment of fines. (X. No. 396.) This is not a very satisfactory mode of reasoning, and he admits the C. N. has adopted Pothier's view (Art. 833), but he says that by the use of the word "*censé*" the article indicates a fiction. So it does, but the fiction is not that *partage* is not *sale*. Evidently it cannot be confounded with either.

It would be a fiction to say it was either a sale or exchange.

But leaving these theoretical discussions, let us look at the reason of the thing, as applied to the case before us. The tacit warranty of our law is the warranty by the vendor *de ses faits et promesses*. This warranty never exceeds the nature of the thing, a doctrine decided formally by this Court in the case of *Dupuy & Ducondy*, recently confirmed in the Privy Council,* and not, I believe questioned in the Supreme Court. Now what were the *faits et promesses* of Prentice? He was making over to Macdougall his share of co-partnership property, which stood in Prentice's name for the benefit of the partners. Prentice was, therefore, acting as the agent of the partnership, the thing was lost by a partnership obligation, and, therefore, Macdougall was his own *garant*. "L'obligation de garantie est indivisible." (24 Laurent 213.) But even if it were to be treated as a sale, it must be remembered that there is an exception to *garantie* even in sale, viz., where the purchaser knew the danger of eviction. Macdougall is presumed to have known his danger, for he was evicted for a partnership debt. He is therefore only entitled to what he paid for the thing—24 Laurent, p. 259, and Pothier, Vente No. 187. Now what did Macdougall pay for his 40 shares? Evidently his interest in the 160 shares. One-half of that is swept away by a partnership liability, so that his share was really 20 out of the 80 remaining. But here respondent raises another difficulty. He claims that he is entitled to stock, and that if that cannot be given to him he is entitled to its equivalent as damages, which are to be valued at the time of the eviction, and he cites Troplong, Vente No. 506. This authority does not apply to the case of a purchaser who knows the cause of his eviction. "Si l'acheteur, qui a acheté avec cette connaissance souffre de cette éviction quelque chose au delà du prix qu'il a payé, il doit se l'imputer, puisque c'est une éviction à laquelle il devait s'attendre; ce n'est pas le vendeur qui l'a induit en erreur," Pothier, vente, 187. Here is how Laurent states the principle of Pothier:

"Des que l'acheteur connaissait lors du contrat, la cause pour laquelle il a été évincé, il renonce au droit de réclamer la réparation d'un dommage qu'il doit s'imputer à lui-même. Sur ce point tout le monde est d'accord."—(24, 261.) And he cites Aubry et Rau and Dalloz.

It is, however, the principles of *partage* and not of sale we have to examine. In the old law it was for a time held that where in a *partage* the party taking the share knew of the cause of eviction, he had no claim at all. The principle seems to be this, that the contract is so far *aléatoire*. This doctrine appears to have been abandoned on the ground of equity. Pothier, Vente, No. 188. But to what is the *co-partageant* obliged? There has been a greatly contested question as to whether the eviction, at all events of a great portion of the share of one of the *co-partageants*, was a cause of rescission of the *partage*. Dumoulin first thought it was, but later he abandoned this opinion on the ground of convenience, and the better opinion seems to be that the obligation is to equalize the shares without a new *partage*. Therefore Prentice has only to account for the value of what he got at the *partage*. That was unquestionably \$9,000. It is therefore a fourth of \$9,000 he has to return.

But how are we to deal with the eight shares? This is the only part of the case which has given us any real difficulty as to the principles involved, and although a matter of small importance pecuniarily, it is not easily disposed of. As we have seen, as a rule of convenience rather than of strict right, the *partage* once carried out, is not set aside for eviction, even of the whole of the share of a *co-partageant*. All the latter's rights consist in a demand to oblige his *co-partageant* to equalize the shares—that is, to a money indemnity. The eight shares abandoned by McEwen formed part of those assigned to Macdougall, one-half for his own benefit, and one-half for the benefit of Prentice; therefore, four should go to Prentice and four to Macdougall, then their value should be taken, and three-fourths of it should go to Prentice and one-fourth to Macdougall, precisely as we divide the \$9000. But it is very difficult to fix the value of

these shares, which have been sequestered during all these years, without doing injustice to one or other of the parties; we therefore say this, the rule which has been adopted from convenience does not apply here. These eight shares have never really been mixed up with the property of either party; but, by the operation of the sequestration, they have remained to be dealt with in the same condition as at the time of the *partage*, and therefore they should be divided in the same manner they ought to have been divided by the *partage*, that is, six should go to the appellant and two to the respondent.

The judgment, therefore, will be reversed, with costs, for respondent's *débat de compte* is unfounded, and it appears he has overdrawn his account to a much greater amount than anything coming to him from the \$9000.

The following is the judgment of the Court:—

“The Court, etc.

“Considering that by an *Acte* passed before Griffin, notary public, on the 19th of March, 1869, the appellant and respondent declared to have formed a partnership as brokers, beginning from the 24th of February, 1869, including the negotiation of loans and other monied transactions, as well as the purchase and sale of mines, and the formation of companies; the profits in the ordinary transactions, as brokers, to be divided in the proportion of two-thirds for the respondent and one-third for the appellant, and those resulting from the sale of mines or mineral interests and from the formation of companies, to be divided in the proportion of three-fourths for the appellant and one-fourth for the respondent, which co-partnership was dissolved on the 2nd of November, 1871;

“And considering that during the existence of the said co-partnership, the appellant, with the aid of one Alexander McEwan, obtained in his own name but for the benefit of the co-partnership, a promise of sale of the franchise and mining rights of “The Montreal Mining Company,” it being understood that the said Alexander McEwan should have one-half of the profits to be derived from said transaction:

“And considering that on or about the 2nd day of September, 1870, the appellant trans-

ferred his rights in the said “The Montreal Mining Company” to Alexander H. Sibley, acting for himself as well as for others his associates;

“And considering that the profits realized by the said sale consisted in 160 parts of 1600 parts or shares in the Association termed “The Canada Lands Purchase Trust”;

“And considering that in or about the month of December, 1870, the appellant sold 80 of the 160 parts or shares by him obtained in the said “Canada Lands Purchase Trust” for the sum of \$9,000, and that on the 21st day of February, 1871, the respondent instituted an action against the appellant in the Supreme Court, New York, by which he alleged that appellant had realized \$22,500 of profits by the said negotiation and sale of mining lands, and claimed that the appellant be condemned to pay him the sum of \$11,250 as his share of said profits;

“And considering that with a view to settle their difficulties with regard to said transaction and suit, the said appellant on the 3rd day of March, 1871, agreed to transfer and did transfer unto the respondent the 80 parts or shares remaining out of the 160 parts or shares in the “Canada Land Purchase Trust,” which he had obtained by the transfer of said mining lands and rights, 40 parts or shares out of the 80 the said respondent agreed to transfer unto Miss Auldjo, the remaining 40 parts being in full for his proportion of the profits derived from said transaction;

“And considering that at the time of the said transfer of the said 80 parts in the Canada Lands Purchase Trust by the appellant to the respondent, the said respondent agreed, by a letter dated the 3rd day of March, 1871, that the said 40 parts or shares so transferred to him for his share of profits in said transaction, should be liable in the same proportion to the whole of the parts or shares originally held by the appellant in the said company for any damage which might result to the appellant by reason of any suit which the said Alexander McEwan might institute against him for failure to secure his interest, or any expenses incurred in the negotiations of the sale of the property;

“And considering that the said transfer of

the 3rd of March, 1871, was not only made to secure to the respondent his share of the profits arising out of the said mining transactions, but also to meet the contingent event of the claim of the said Alexander McEwen to the ownership of the said 80 shares, and that in consequence of the judgment herein-after mentioned, declaring the said Alexander McEwen owner of the said 80 shares, the said transfer became inoperative;

"And considering that before the said transfer was duly completed and registered in the books of the Trust, the said Alexander McEwen claimed before the New York Supreme Court, as his share in the profits in the said transaction, the 80 shares or parts in the said Canada Land Purchase Trust so transferred by the appellant to the respondent, which 80 shares by a decree of the said Supreme Court of the 9th of December, 1871, were adjudged to be the property of the said Alexander McEwen;

"And considering that subsequently the said Alexander McEwen, by compromise, agreed to transfer and did re-convey eight of the said 80 parts in the said Trust, to Walter Shanly and James D. Crawford, trustees appointed by the appellant and the respondent, to hold the said eight shares on their behalf until an adjustment of their claims had taken place, the said Trust being now represented by 288 shares of the nominal value \$100 each in the Silver Mining Company of Silver Islet and eight shares of The Ontario Mineral Lands Company;

"And considering that through the adjustment in the present case of the accounts of the affairs of the said co-partnership, exclusive of the rights which the said parties may have against each other with regard to the said mining rights, there is now due to the appellant by the respondent a sum of \$16,185.51, as mentioned in the judgment rendered by the Court below;

"And considering that through the claim of the said Alexander McEwen the said respondent has been deprived of the whole of the 40 shares allotted and transferred to him as his share of the profits in the said transaction;

"And considering that he is entitled to claim his proportion of one-fourth of the sum

of \$9,000, for which the said respondent has sold 80 of the said 160 shares or parts in the said Canada Land Purchase Trust or \$2,250 currency, with interest on the said sum from the 30th December, 1870, date of the sale by the respondent of said mining rights, and also his one-fourth part of the said eight shares or parts in the said company now represented by the 288 shares of the nominal value of \$100 each in the Silver Mining Company of Silver Islet and eight shares of The Ontario Mineral Lands Company;

"And considering that the said sum of \$2,250, and interest as aforesaid, are more than compensated by the sum of \$16,185.51, which is due and owing by the respondent to the appellant according to the adjustment of accounts as made in and by the judgment appealed from, to wit, the judgment rendered on the 31st of March, 1881, by the Superior Court sitting at Montreal, and that there is error in the said judgment of the 31st March, 1881;

"This Court doth reverse the said judgment of the 31st March, 1881; and proceeding to render the judgment which the said Superior Court should have rendered, doth adjudge and order that the said eight shares in the said Canada Land Purchase Trust, in the hands and possession of the said Walter Shanly and Jas. D. Crawford, in trust, which shares are now represented by 288 shares of the nominal value of \$100 each in the Silver Mining Company of Silver Islet and eight shares in The Ontario Mineral Lands Company, so that six of the said eight shares of the Canada Land Purchase Trust or 216 shares in the Silver Mining Company of Silver Islet, and six of the eight shares in the Ontario Mineral Lands Company, shall belong to the said appellant, and two of the said 8 shares of the said Canada Land Purchase Trust, or 72 of the said 288 shares in the Silver Mining Company of Silver Islet and two of the eight shares of the Ontario Mineral Lands Company shall belong to the said respondent, as their respective shares in the said partnership property, and the said parties are hereby ordered to make to each other within one month from the date of this judgment a regular transfer of their respective shares in

the said mining stock, and to grant the necessary discharge for the same to the said trustees, and in default of doing so within the said delay, this judgment shall be held to be in lieu and place of a regular transfer by the parties to each other of the said shares in the said respective proportions, and to be held as a good and valid discharge to the said trustees for the said shares; it being ordered that any profits derived from the said shares now due, or which may have been received by the said trustees, shall be accounted for and paid to the said parties in the above proportions;

"And the Court doth dismiss the other conclusions of the action of the respondent, each party paying his own costs in the Court below, and doth condemn the respondent to pay the costs on the present appeal: reserving to the appellant his recourse for any balance which may be due him by the respondent."

Judgment reversed.

R. A. Ramsay for appellant.

S. Bethune, Q.C., counsel.

Dunlop & Lyman for respondent.

R. Laflamme, Q.C., counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, May 21, 1884.

DORION, C.J., RAMSAY, CROSS, TESSIER and BABY, JJ.

SUNDBERG, appellant, and WILDER, respondent.

Procedure—Correction of clerical error in register of judgments.

DORION, C.J. In this case the respondent moves that the record be sent back to the Court below, for the purpose of having an error in the copy of judgment corrected. It appears that the draft of judgment as prepared by the Judge who rendered judgment is correct, but in the registration a clerical error has occurred, by which a wrong number is given in the description of certain land. The judgment as it is registered is not the judgment rendered by the Court. There are English precedents which show that the Courts go very far in permitting the rectification of such

errors. But it is evident that this Court sitting in Appeal has no authority to interfere. The error must be corrected by the Court below. It is not necessary at present to send back the record. The Court below has power to correct the error in the registration, and when that is effected, a correct copy may probably be produced here, and admitted in the place of the copy which contains the error of description. The motion to send back the record, in order to have the error corrected, is therefore rejected for the present.

RAMSAY, J., concurred, on the ground that there is no doubt that a purely clerical error, whether by Judge or the Clerk of the Court, can be rectified. His Honour added that this was one of those matters which members of the bar ought to settle among themselves.

Motion rejected.

Oughtred for respondent moving.

Brown, Q.C., contra.

GENERAL NOTES.

THE N. Y. CODE.—The New York legislature has postponed the question of codification in that State for the present, by passing a bill for the appointment of a commission to revise the draft code, and report as to amendments which may be deemed necessary.

SOLICITORS AND THEIR COSTS.—At the sittings in chambers of the Queen's Bench Division of the High Court of Justice on Thursday, Mr. Justice Denman, Mr. Justice Manisty, and Mr. Justice Watkin Williams, had before them an application in the case of the *London Scottish Building Society v. Charley et al.* which raised an important question as to the costs which a solicitor who appears in person may recover against a defeated opponent. The plaintiffs had brought an action against the defendants, who appeared in person and acted as their own solicitors, recovered judgment and costs against the plaintiffs. Upon taxation of their bill the question arose whether they could claim remuneration for their professional services to themselves as the defendants' solicitors, or whether they were not in the same position as any other litigant in person, and as such only entitled to recover costs out of pocket actually paid, and not any sum for remuneration for time and labour, or what are termed profit costs. The Master decided to allow the defendants' costs as solicitors, and the Judge in Chambers referred the matter to the court. The court now held that, although there was a difference of opinion, the preponderance was in favour of allowing these costs, the opinion of so great an authority as the late Lord Justice Lush being also in favour of a solicitor being allowed to recover them. Thus, upon all grounds, the decision of the Master must be upheld.

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MAY 31, 1884.

No. 22.

HODGE v. THE QUEEN.

In reporting the case of *Hodge v. The Queen* (7 L. N. 18), the *Criminal Law Magazine*, for May, adds a note by Dr. Francis Wharton, a well-known author. It will be observed that Mr. Wharton takes substantially the same view of the question of imprisonment as was set forth in the article of "R." which appeared in this journal (7 L. N. 49). The following is the note in question:—

The position taken in the opinion of the Privy Council, as above reported, that the power to impose imprisonment, when given in a legislative enactment, implies, in countries subject to the English common law, a power to impose compulsory hard labor is one of great importance. Not only does it involve interesting questions of constitutional and statutory construction in its largest sense, but it applies to all cases of powers to inflict punishment, whether such powers are contained in provincial or state constitutions, or in statutes regulating the action of the Courts in the distribution of penal justice, or in the charters of municipal corporations. I cannot bring myself to think that the decision of the Privy Council, as above given, is right; and I have the less reluctance in expressing this opinion from the fact that the question, as stated by the Court, "was not raised on the rule nisi for the writ of *certiorari*," and is not to be "found amongst the reasons against the appeal in the appellate court in Ontario."

1. Unless the power claimed to be exercised is either included from the nature of things, in that imparted, or has been held by settled judicial precedent to be so included, it would be excluded by force of the familiar rule that statutes imposing restrictions or penalties are not to be construed to authorize any restriction or penalty beyond those specifically designated.

2. The careful specification of modes of punishment in the section before us tends to show that each particular term was used in a strictly technical sense. That particular specifications work a contraction of the sense of the specifications within the technical limits, has been often determined. A statute, for instance, making it penal maliciously to injure "horses," might, if the term stood by itself, include the malicious injury of geldings. If, however, the statute should enumerate the objects of protection as "horses, mares and colts," this very specification would be regarded as an exclusion of all objects which, on a more general interpretation of the word, might be regarded as included under the term "horse." It is by the application of this principle that the common law offence of malicious mischief has assumed proportions in most jurisdictions in the United States so much greater than those to which it has been restricted in England. In England, a series of statutes have been adopted imposing severe penalties on the malicious destruction of particular articles of property, *e. g.*, machinery of certain specified classes. It has been, consequently, not illogically held by the English Courts that this specification is more or less an exclusion; and that parliament, by the enactment of these statutes, is to be understood as saying, "No other kind of malicious mischief is to be punished than those specified." It is hard to see why the enumeration, in the statute before us, of three kinds of punishment, "fine," "penalty" and "imprisonment," should not have a similar operation. Each of these terms has its particular technical meaning. A "fine" is a compulsory payment of money. A "penalty" indicates not only this, but the compulsory return of articles stolen. The very enumeration of "fine" and "penalty," as distinguished from "imprisonment," shows that "imprisonment" is not to be so construed as to include either "fine" or "penalty"; and if it does not include either "fine" or "penalty," it is hard to see how it can include any other penal discipline than that which the term "imprisonment" specifically imports. It is on this principle that the judicial application of the limitations in

the constitution of the United States rests. Had that constitution, after giving to Congress legislative functions, stopped, then Congress would have been as absolute as parliament. But the constitution goes on to enumerate the legislative powers given to Congress, *e. g.*, to coin money, to provide for an army and navy; and even the most latitudinarian expositors of the constitution agree that this enumeration restricts the legislative power of Congress to the exercise of these delegated functions.

3. It remains, then, to consider how far the power to impose hard labor is included in the power to impose imprisonment, limited as the latter is from its being made distinguishable, in the statute, from the power to fine and the power to impose a penalty. And the first remark to be made is, that hard labor is not a punishment inflicted at common law as a concomitant to imprisonment. The records of the English criminal courts will be searched in vain for any instance of this cumulation; and the histories of the times, whether coming to us in the guise of annals or of fiction, show that the English prisons were far from being tenanted by persons forced to "hard labor." It was only by force of specific statutes that the "work-house" was established as a method of employing certain classes of convicts; nor was "hard labor," as a concomitant of "imprisonment," introduced in England until the statutes establishing penal servitude. There was no law until that period authorizing it, and the judges were precluded from imposing it by the clause in the bill of rights (1 W. & M., sess. 2, c. 2, *preamble*,) forbidding the infliction of "illegal and cruel punishments." Hard labor cannot be spoken of as cruel, but, in view of the fact that it was unknown as a common law punishment, it must be regarded in England as "illegal" until authorized by act of parliament.

Mr. Wharton concludes by referring to the rulings of the courts in the United States. This portion of the article we hold over for the present.

SPONGING ON PROFESSIONAL MEN.

In an amusing little book published not long ago, "John Bull et son Ile," the English solicitor's bill of costs comes in for its share

of satire. The following little bill is printed as a sample:—

	a. d.
"To receiving a letter from you and reading it	3. 6.
To writing the answer	3. 6.
To hiring a cab	5. 0.
To thinking of your affair in the cab	3. 6.
To listening to your remarks	3. 6.
To answering them	3. 6.
To meeting your father-in-law and speaking to him of your affair	3. 6.

This is a long way behind many of the old stories of solicitors' bills, with which our readers are no doubt familiar. One of these runs somewhat in this way: A person with a lawsuit on hand was bathing in the sea at Brighton, when he observed the head of his solicitor rise above the water. He immediately hailed him with the inquiry, "Mr. Jones, how is my case getting on?" "Famously," cried Mr. Jones, who immediately dived out of sight, and put an end to the consultation. At a later date the client read in his bill of costs the following item:—

	a. d.
To conferring with you at the sea-side as to your case	5. 0.

But however much amusement may be extracted from such anecdotes (and lawyers are usually most prodigal in using them), it is well known that professional gentlemen have more or less to protect themselves against those who would use their brains and experience without any acknowledgment. Some of the daily journals have been inclined to gibe at the case of *Cooke v. Penfold*, which is noted in the present issue. It seems to us that these writers are geese, and that they are simply producing the *sifflement* which comes most natural to them. What are the facts? Mr. Penfold, a rural gentleman, had been appointed trustee to an estate. He was in doubt as to the legal form of conveyance, and he set out to town for advice. He meets Mr. Brooke in a railway car. He knows him to be a lawyer, and he submits the difficulty to him, and obtains a reply. Mr. Brooke gives an opinion for which Mr. Penfold would no doubt quote him as the authority, and if it were incorrect, Mr. Brooke's reputation would, doubtless, suffer. What was the upshot? The firm of Cooke & Brooke, to which Mr. Brooke belongs, a firm, by the way, practising at Montreal, sent in to Mr. Penfold the very moderate memorandum of charge of \$3 for professional advice. Mr.

Penfold is horror-stricken at the presumption of a lawyer, who makes his bread by professional work, charging for an opinion given in a railway car, and engages other counsel to contest the claim. There was incontestably a service rendered and the right to recover for that service was equally incontestable. The individual concerned must be the judge of the propriety of bringing the action. Probably nine out of ten would have dismissed the matter from their thoughts, when payment was objected to, or would have sent Mr. Penfold a receipted account, and have left him to do as he thought proper. But an action being brought, the Judge was guided by his sense of right, and gave judgment for the amount of the account, Mr. Brooke waiving his claim to costs of suit. The incident is useful in putting a check upon the tendency to "dead-head" at the expense of the profession. If people suppose that they can save their dollars by getting opinions on a railway car or across a hotel table, there will always be some mean enough to resort to the artifice.

NOTES OF CASES.

SUPERIOR COURT.

MONTRÉAL, May 23, 1884.

Before JETTE, J.

LAMBES *ex qual.* v. THE NORTH BRITISH & MERCANTILE FIRE & LIFE INSURANCE CO.

Powers of Local Legislature—Taxation of Insurance Companies—45 Vict., ch. 22.

1. *The Queen, as the sovereign authority, forms an essential part of the legislatures created by the B. N. A. Act for the government of the Provinces, and the Act 45 Vict. ch. 22 (Q.) was validly passed in the name of Her Majesty.*
2. *The tax imposed on corporations by the said Act is a direct tax, and within the functions of the local legislature.*
3. *The distribution or apportionment of taxation among the various classes of citizens is a matter for the legislature alone to determine.*

The judgment fully explains the grounds of the decision :—

"La cour, etc.

"Attendu que par l'acte de la législature provinciale de Québec, 45 Vict. ch. 22, inti-

tulé: 'Acte pour imposer certaines taxes directes sur certaines corporations commerciales,' il a été décrété que toute compagnie d'assurance acceptant des risques et faisant des affaires d'assurance, en cette province, paierait annuellement, pour une seule branche d'affaires, une somme de \$400, pour toute branche additionnelle d'affaires, une somme de \$50, et pour chaque bureau, à Montréal ou à Québec, une somme de \$100; que ces diverses sommes seraient payables le 1er jour juridique de juillet chaque année, à l'Inspecteur des Licences du district de revenu où la compagnie aurait son bureau;

"Attendu que la défenderesse est une compagnie d'assurance ayant un bureau en la cité de Montréal, et qu'elle y fait des affaires sur la vie et contre le feu; en sorte qu'elle est passible des diverses sommes sus-mentionnées s'élevant à la somme totale de \$550, que le demandeur en qualité lui réclame comme étant due et payable depuis le 3 juillet 1882;

"Attendu que la défenderesse plaide à cette demande par deux exceptions, disant:

1o. Que la loi invoquée n'a aucune existence légale, attendu qu'elle a été irrégulièrement passée au nom de Sa Majesté qui ne fait pas partie de la législature provinciale et n'a aucun pouvoir législatif en cette province;

2o. Que si cette loi a une existence quelconque elle est dans tous les cas inconstitutionnelle et ne peut affecter la défenderesse;

(a) Parceque cette compagnie n'a pas été créée par la législature provinciale, et qu'elle est dûment licenciée par le pouvoir fédéral, pour exercer ses droits;

(e) Parceque la taxe réclamée n'est pas une taxe directe;

(i) Parceque cette taxe n'est imposée que sur certaines classes de la population; qu'elle ne frappe que les corporations commerciales et non les biens; et qu'elle ne tombe dans aucune des catégories d'impôts que la législature a le droit de décréter;

(o) Parceque cette taxe constitue une réglementation du commerce;

(u) Enfin parceque cette taxe est de la nature d'une licence.

"Considérant que Sa Majesté, personnification de l'autorité souveraine dans toutes les provinces de l'Empire, fait essentielle-

ment partie des diverses législatures créées pour le gouvernement particulier de ces provinces et que les Lieut.-gouverneurs n'y sont que ses représentants ;

" Considérant en conséquence que la loi invoquée a été valablement passée au nom de Sa Majesté ;

" Considérant que toute personne ou corporation privée, jouissant de droits quelconques dans les limites de la province, y est nécessairement soumise au contrôle de la législature de cette province et aux obligations qu'elle peut imposer pour la contribution de chacun aux charges publiques ; et qu'aucune licence du pouvoir fédéral ne saurait soustraire la défenderesse à ces obligations ;

" Considérant que la taxe réclamée frappe les corporations imposées directement et sans intermédiaire entre elles et le fisc, ce qui est le caractère essentiel et principal de l'impôt direct ;

" Considérant que la répartition de l'impôt sur les diverses classes de citoyens ne saurait être mise en question devant les tribunaux, la législature étant seul juge de l'opportunité de la répartition par elle adoptée ;

" Considérant que rien dans l'acte constitutionnel de 1867 n'enlève aux législatures provinciales le pouvoir de taxer les corporations commerciales ou autres, et que la taxe imposée dans l'espèce, qui est de la nature d'un droit de patente exigé à raison de l'exercice d'une profession ou d'un négoce, est essentiellement dans les attributions de l'autorité législative provinciale ;

" Considérant que la taxe réclamée ne constitue pas une réglementation du commerce dans le sens de l'art. 91 du statut impérial de 1867 ;

" Considérant en conséquence que les exceptions et défenses de la défenderesse sont mal fondées ;

" Les renvoie et condamne la dite défenderesse à payer au demandeur la somme de \$550 courant avec intérêt du 3 juillet 1882, et les dépens distracts," etc.

Judgment for the plaintiff.

Lacoste, Globensky, Bisailon & Brosseau, for plaintiff.

Kerr & Carter, for defendant.

SUPERIOR COURT.

MONTREAL, May 19, 1884.

Before MATHIEU, J.

DESOLA et al. v. STEPHENS.

Fire in leased premises—Presumption of fault—C. C. 1629—Action to resiliate lease—C. C. 1634, 1660.

Even though the leased premises have become temporarily uninhabitable during necessary repairs occasioned by a fire which has damaged a portion of the premises, the lessee cannot obtain the resiliation of the lease without rebutting the presumption of law that the fire was caused by his fault.

A claim in the lease stipulating that the lessee shall "deliver up the said premises at the expiration of the said lease in as good order as the same shall be found in at the commencement of the present lease, reasonable wear and tear and accidents by fire excepted," is not a waiver on the part of the lessor of the presumption established by Art. 1629, C. C., but merely expresses the provisions of Art. 1632, C. C.

A mere theory as to the origin of the fire will not exonerate the lessee from this presumption ; and in the present case the theory suggested by the evidence would, if proved, establish the lessee's responsibility for the fire in question.

The formal judgment of the court sufficiently explains the questions at issue, and the grounds of the decision.

" La cour, etc. . . . Attendu que les demandeurs allèguent dans leur déclaration que par bail fait à Montréal le 14 février 1883, devant Maître J. H. Isaacson, notaire, le défendeur leur aurait loué pour le terme de trois années à compter du 1^{er} jour de mai 1883, une bâtisse ayant la façade en pierre de taille et à quatre étages située dans le quartier du centre de la cité de Montréal, à l'encoignure des rues St. François Xavier et St. Paul ; que ce bail fut fait pour le prix de \$800 de loyer annuel, payable par trimestre, commençant le premier jour d'août 1883 ; que les locataires s'obligeaient de garnir les lieux loués et de les remettre à l'expiration du bail en aussi bon ordre qu'ils étaient au commencement d'icelui, sauf l'usage et les accidents par le feu qui furent exceptés ; que les demandeurs

prirent possession des lieux loués et payèrent régulièrement leur loyer jusqu'au premier de février 1884; que le matin du dimanche, 23 mars dernier, la dite bâtisse fut sérieusement endommagée par le feu, la fumée et l'eau; que les chassis et les volets du troisième étage de la dite bâtisse ayant été complètement détruits et les soliveaux entre le second et le troisième étage et les planchers de ce dernier étage brûlés; que les plafonds et les enduits dans les dits lieux ont été grandement endommagés par le feu et l'eau; que les divisions ont été brûlées et que le mur de côté de la dite bâtisse faisant front sur la rue St François Xavier est dans une telle mauvaise condition entre le deuxième et le troisième étage résultant du feu qu'il sera nécessaire de le reconstruire; que le dommage fait à la dite bâtisse par le dit incendie a rendu les lieux loués inhabitables, et que même si le défendeur voulait faire les réparations nécessaires elles seraient de nature à rendre les dits lieux inhabitables par les locataires d'iceux et entièrement impropres pour leur besogne; que les demandeurs ont loué la dite bâtisse pour les fins de leur commerce comme fabricants de cigares et marchands de tabac, et qu'ils ont employé et emploient encore environ deux cents hommes y compris des jeunes garçons et des filles pour la manufacture des dites cigares pour une période déterminée et à des gages fort élevés; que les lieux étant inhabitables et entièrement impropres à la besogne des demandeurs ou à aucune autre industrie en raison du dit incendie, de la fumée et de l'eau, les demandeurs sont obligés de se pourvoir sans délai d'une autre bâtisse pour y continuer leur industrie et s'éviter les dommages résultant des engagements qu'ils ont fait avec les dits employés; que les dits demandeurs sont obligés, sous les circonstances, de demander la résiliation immédiate du dit bail vu que les lieux sont inhabitables, et qu'il est impossible au défendeur de faire les réparations nécessaires pendant l'occupation des demandeurs et le tort considérable que ces derniers éprouveraient pendant ces réparations; que les demandeurs ont toujours été prêts à payer au défendeur tout le loyer par eux dû, savoir depuis le premier février dernier jusqu'au 23 mars dernier, date du dit incendie,

lequel loyer s'élève à la somme de \$114 que les demandeurs ont offert par le ministère de George R. H. Kittson, notaire, le 29 mars dernier, et qu'en même temps ils ont fait notifier le défendeur de leur intention de demander la résiliation du dit bail pour les causes ci-dessus énoncées, et que le défendeur a refusé d'accepter, laquelle somme les demandeurs ont déposé dans le bureau du protonotaire de cette cour en paiement du dit loyer jusqu'à la date du dit incendie, et concluant en demandant acte de telles dites offres, et la résiliation du dit bail du 14 février 1883;

" Attendu que le dit défendeur a plaidé à cette action, disant qu'il est vrai que le 23 mars dernier, il y eut un incendie dans les lieux loués causé par la négligence grossière des demandeurs et de leurs employés; que cet incendie était de peu d'importance et fut promptement éteint et que les dommages en résultant sont peu importants et limités à un étage seulement de la dite bâtisse, et que ni le dommage causé et les réparations nécessaires pour rétablir les lieux loués et les remettre dans le même état et condition où ils étaient avant cet incendie ne sont pas de nature à rendre les lieux inhabitables ou empêcher les demandeurs d'y continuer leur industrie comme ci-devant; qu'immédiatement après l'incendie le défendeur a commencé avec la plus grande diligence à réparer le dommage causé et que ces réparations sont terminées sous peu de jours; que malgré le peu d'importance du dommage et des réparations à faire, les demandeurs étant désireux pour d'autres raisons de laisser les lieux loués, avaient avant le dit incendie fait des arrangements pour louer d'autres prémisses situées sur la rue des Sœurs-Grises, dans la cité de Montréal, et qu'ils ont cherché à trouver un autre locataire pour les lieux loués par eux du défendeur, et qu'immédiatement après le dit incendie ils ont laissé les lieux loués pour occuper cette autre bâtisse, agissant de mauvaise foi et se servant de cet incendie comme d'un prétexte pour laisser les lieux loués et demander la résiliation du bail;

" Considérant qu'il est décrété par l'article 1629 du Code Civil que lorsqu'il arrive un incendie dans les lieux loués il y a présomption légale en faveur du locateur qu'il a été

causé par la faute du locataire ou des personnes dont il est responsable ;

"Considérant que la prétention soumise par les demandeurs que l'incendie dont il est question a été le résultat d'un vice dans le tuyau de gaz, qui servait à chauffer l'étuve pour leur résine ou dans les appuis de ce tuyau, n'est pas suffisamment prouvée, mais qu'il paraît plutôt probable que le dit incendie a été causé par l'étuve susdite, soit parce qu'il n'y aurait pas eu assez d'eau, ou pour quelque autre raison, et que cette étuve en tombant après que ses étais furent consumés, aurait brisé le tuyau de gaz ;

"Considérant qu'il est d'autant moins probable que ce soit le tuyau de gaz qui ait été défectueux ou que ses appuis se soient brisés ; que le dit tuyau passait entre le plancher et le plafond, et que la preuve ne fait pas voir qu'il ne fût pas suffisamment appuyé sur le plafond ;

"Considérant que l'étuve susdite devait être entretenue par les dits demandeurs de manière à prévenir tout accident par le feu, et que si cet incendie a été causé par cette étuve, les demandeurs en sont responsables ;

"Considérant que soit que le dit incendie ait été causé par cette étuve, soit qu'il ne l'ait pas été, les dits demandeurs en sont encore responsables aux yeux de la loi, parce que dans le premier cas ils étaient obligés de tenir cette étuve en bon état, de manière à prévenir tout incendie, et que dans le second cas ils n'auraient pas prouvé que la cause de l'incendie ne peut leur être attribuée ;

"Considérant que lorsqu'un incendie a été causé par la faute du locataire, ce dernier ne peut demander la résiliation du bail, parce que les lieux loués seraient inhabitables pendant le temps des réparations ;

"Considérant que la clause qui se trouve dans le dit bail, obligeant les demandeurs à remettre, à l'expiration du bail les lieux loués dans le même état qu'ils étaient lorsqu'ils en ont pris possession, sauf l'usage et les accidents par le feu, ne peut soustraire les demandeurs à la responsabilité résultant d'un incendie que la loi présume avoir été causé par leur faute, en l'absence de toute preuve contraire, vu que cette clause ne paraît excepter que les incendies dont le locataire ne

serait pas responsable, comme il en est de l'usage ;

"Considérant que les demandeurs ne peuvent non plus se soustraire à la responsabilité qui leur incombe par le fait que le défendeur aurait reçu des compagnies d'assurance le montant des dommages faits à sa bâtisse, et que s'il en était ainsi le défendeur serait privé du prix de la jouissance de son immeuble sans indemnité ;

"Considérant que les défenses du dit défendeur sont bien fondées, et que l'action des dits demandeurs est mal fondée ;

"A maintenu et maintient les défenses du dit défendeur, et a renvoyé et renvoie l'action des dits demandeurs avec dépens, distraits à Maitres Wotherspoon & Lafleur, avocats du dits défendeur."

Plaintiff's authorities :—

C. C. arts. 1634, 1645 and 1660.

Guyot—Répertoire. Vol. 2, Verbo "Bail," p. 34 ; also paragraph 5, page 35.

Pothier—Louage. Articles 139 et 140, et 147, 149 et suivants.

Dalloz—Jurisprudence générale. Vol. 30, verbo "Louage," page 317, arts. 176 et 180, 181, 183.

Code Napoléon, art. 1724 ; *Brillon* recueil d'arrêts.

Duranton, No. 67 ; *Ducorgier*, No. 300 ; *Troplong*, No. 251.

Lambert v. Lefrançois. Lower Canada Reports, p. 16.

Defendant's authorities :—

C. C. arts. 1629, 1632 et 1660.

Allie v. Foster. 15 L. C. J. 13.

Rapin v. McKinnon. 17 L. C. J. 54.

Bélanger v. McCarthy. 19 L. C. J. 181.

Séminaire de Québec v. Poitras. 1 Q. L. R. 185.

McDougall v. Hamburger. 6 L.N. 332.

Marchand v. Caty et vir. 2 L. N. 263.

Girard v. Gareau. DeBellefeuille, Code Annoté, art. 1629.

Pothier (Ed. Bugnet). Tom. IV, p. 109 ; Louage, No. 309.

Guyot—Répertoire. Vo. "Bail," p. 33, 10e partie, No. 6.

G. Joseph, for plaintiffs.

J. Bates, counsel.

Wotherspoon & Lafleur, for defendant.

SUPERIOR COURT.

MONTREAL, April 29, 1884.

Before JOHNSON, J.

MARTIN V. LABELLE.

Procedure—Execution—C. C. P. 581.

Where the plaintiff omitted to give credit for monies received on account, held, that the defendant was entitled to file an opposition and prevent the sale for more than the amount due.

Money paid by the defendant to the seizing officer to prevent a sale of his effects is money levied within the meaning of C. C. P. 601, and must be returned into court where an opposition is filed.

PER CURIAM. This case is before the court upon two oppositions, both of them contested by the plaintiff. The first is the opposition of the defendant himself, based upon the last part of article 581 C. P. C., which says that if a part only of the debt is paid, the opposition prevents the sale for more than is due; and that is just what is asked by the opposant here now. He says he paid \$133.39 on the 11th of December, and he asks that the seizing officer should be ordered to levy the balance only (some \$619) remaining due. The facts proved are that on the 11th of December last at 5 p. m., an execution having been issued by the plaintiff, and the seizure made under it, a sum of \$133.39 was paid to him, as appears by his receipt written on the back of the writ bearing the apparent date of 13th December, and signed by the plaintiff himself. This receipt, however, was not written on the back of the writ until after the 24th December, as shown by the evidence of the bailiff Dansereau in his cross-examination. On the 24th December, the day before that fixed for the sale, the defendant, there being no retraxit for the sum paid, filed the opposition for a partial annulment of the writ.

The plaintiff contests by saying that when the seizure took place the whole debt was due, and remained due when the bailiff had finished seizing, which is inexact, the proceedings on the seizure terminating only on the 11th in the evening, and the \$133.39 being paid during that day. The plaintiff says, further, that the defendant and the guardian were both of them informed that the sale would only take place for the balance. The bailiff, however, admits that he only informed the defendant that he had been instructed to deduct the amount paid at the moment when the opposition was signified to him between 4 and 5 in the afternoon. He admits, however, that the bailiff Darveau had warned him that an opposition was being prepared, and he went to get it at the office of the defendant's attorneys. He admits, further, that he had not then his writ with him;

and further still, he admits that on the 24th December the receipt on his writ, signed by plaintiff, as of the 13th December, was not there, but was only put there afterwards. Thus it would appear that if the defendant wanted to prevent his effects from being sold to satisfy what was not due he had to resort to this opposition; and the plaintiff who undertakes to contest it is entirely wrong, and his contestation should be dismissed with costs.

The second opposition is *afin de conserver*, and is made by Kent and Turcotte, to whom all the creditors of the defendant excepting the plaintiff himself had made an assignment. The plaintiff does not contest the quality of the opposants as creditors of the defendant, or as representing the creditors; on the contrary, there is an admission that they are creditors and that the defendant is insolvent, and had made an assignment for the benefit of his creditors. The effect of such an assignment as against non-consenting parties is not, therefore, now in question.

It appears by the return of the bailiff that on the 24th December, the defendant by the hands of Kent paid into the bailiff's hands \$730, being the balance he could levy; and at that time the opposition *afin de conserver* had been served. This opposition alleges the insolvency and *déconfiture* of the defendant, and asks that the monies levied be brought before the court, and distributed *au marc la lievre* among the creditors in the ordinary way. The plaintiff contests this opposition, and he says that true enough this money was paid to the seizing officer by the defendant acting through Kent to avoid a sale of his effects; but he contends that this money is not to be considered monies levied in the sense of the law (art. 601, C.P.C.) That article is: "The monies seized or levied after deducting duties and taxed costs may be paid by the sheriff to the seizing creditor, if no opposition has been placed in his hands; otherwise he must return them into court." The plaintiff must sustain, in order to succeed, that monies paid by a defendant under stress of execution are monies not levied from him. Art. 564, C.P., says that if current money is seized the sheriff must return it with the other monies levied, so that

monies can certainly be levied without a sale. It appears to me that these monies are levied in the sense of the law, otherwise any insolvent debtor could prefer one creditor to another by simply paying the bailiff, on a previous understanding with him to that effect. This was not even a voluntary payment by the debtor. It was money furnished by the creditors of an insolvent. The only question would seem to be: if that is the case, who is to get it? Is it to go, all of it, to the plaintiff? By what right, if the money is before the court, and if there are oppositions, and if the insolvency is there?

I shall maintain this opposition and dismiss the contestation. The only difficulty, a technical one, which I have felt in this matter has been that these monies were never seized or taken in execution at all. In that respect the case differs from the one where money may have been seized and returned into court under article 564 C.P.; but that can make no difference here, because whether they were seized or not, or whether the bailiff would have been bound to seize them if he had found them there on the table, they are returned before the court. Whether he could have refused to take the money or not is a point not raised. All we have to do with is the money actually before the court. Whether levied, or merely paid by an insolvent can make no difference to the rights of the creditors now that the money is here; and it can make no difference to the plaintiff if it is the money of a debtor *en déconfiture*.

Archambault & Co. for plaintiff.

Geoffrion & Co. for defendant.

CIRCUIT COURT.

RICHMOND, May, 1884.

Before Brooks, J.

Cooke et al. v. Penfold.

Solicitor—Professional advice—Opinion given "en voyage."

A solicitor may recover for consultation and advice given outside of his office.

The plaintiffs brought the present action for \$3 for professional services rendered (consultation and advice). The defendant, who

combines the callings of Insurance Agent and Assignee, pleaded a general denial.

The defendant when examined in Court admitted the advice, that it was given in answer to questions asked by him, and he did not dispute the charge for the services rendered, but rested his defence on the contention that the consultation in question having taken place in the course of a casual conversation on board of a railroad car on which he and one of the plaintiffs were passengers, there was no right of action. It was elicited that the defendant was at the time actually on his way to Montreal to obtain advice on the point concerning which he consulted the plaintiff.

The Court in rendering judgment suggested that under the circumstances, as the defendant had not expected to be charged, the plaintiff should waive costs, which was done, and judgment was rendered for the amount of the action accordingly.

Judgment for plaintiff.

C. J. Brooke, for plaintiffs.

Hon. Hy. Aylmer, for defendant.

GENERAL NOTES.

The first and second numbers of the *American Law Journal* have been issued at Columbus, Ohio. These issues promise well. In the first number there is a treatise on Master and Servant, by James M. Kerr. In the second issue Dr. Wharton has an article on the reputation of the deceased in Homicide cases. We welcome our new contemporary to the ranks of legal journalism.

Referring to the Cincinnati riots, the writer in the *Century*, from whom we have already quoted, says, in the June number:—"Out of seventy-one prosecutions for murder and manslaughter in the courts of Hamilton county during the two years ending June 30, 1883, four resulted in acquittal, two in quashed indictments, six in imprisonment, and fifty-nine were still pending. Of such a paralysis of justice the logical results are, first a carnival of crime, and then anarchy. No wonder that the trade of burking had sprung up in Cincinnati, and still less wonder that a desperate populace trampled under foot the laws that had no longer any claim on their respect. If Cincinnati had convicted and punished half, even, of the homicides prosecuted in her courts during the last two years, this riot would never have happened, a fearful loss of property and of life would have been averted, and she would have escaped a blot upon her good name."

The Legal News.

VOL. VII. JUNE 7, 1884. No. 23.

HODGE v. THE QUEEN.

The following is the conclusion of Dr. Wharton's note upon this case (pp. 169-170):—

The rulings of the courts in the United States sustaining the positions taken above, are numerous. Many are the reported cases in which sentences to hard labor have been sustained, but not one can be found in which the power to impose hard labor was not given by statute. It is true that where labor is part of the discipline of a particular prison, then parties committed to such prison are obliged to submit to such discipline, though it is not part of the specific sentence. But this is a matter of discipline, shifting with the prison, some prisons (aside from statutory requisitions) requiring only that each prisoner should keep his own cell in order, others requiring that prisoners shall take part, according to direction, in the general work of the institution. But, be this as it may, no court can impose hard labor as a condition of punishment unless this power be specified by statute. See *Exp. Karlendick*, 93 U. S. (3 Otto) 396; *Exp. Pearson*, 59 Ala. 654; *Exp. Simmons*, 62 Ala. 416; *Hannahan v. State*, 7 Tex. App. 664; *Boone v. State*, 8 Lea (Tenn.) 774; *State v. Barnes*, 37 Ark. 448; *Re Ryan*, 45 Mich. 173. In 1847 the question arose almost in this shape in *Daniels v. Commonwealth*, 7 Pa. St. 393, in which case we have the following opinion from Rogers, J.: "The twenty-first section of the Act of July 12th, 1842, directs that every person convicted of fraud as therein prescribed shall be imprisoned in the penitentiary or in the county jail, at the discretion of the court, not exceeding one year, or by fine not exceeding three times the value of the money or property or other thing so obtained; or by both fine and imprisonment. To the punishment awarded by the Act there is superadded in the sentence, 'hard labor,' which, as the defendant contends, is not warranted by the statute. That there may be imprisonment without labor is a proposition which need

only be stated; and whether it be a less punishment, as is contended, or a greater punishment, would seem to be immaterial. In the *King v. Bourne*, 7 Ad. & El. 58, a judgment was reversed because the court sentenced the offender to transportation for seven years, in a case punishable only with death. The courts proceed on the safe principle that the punishment only which the statute awards can be inflicted, the court having no power to alter or vary it, and, consequently, it would be a usurpation of an authority not delegated, which cannot be tolerated in a government of laws. Is, then, the sentence illegal? This is a question which we think is virtually decided in *Commonwealth v. Kraemer*, 3 Binn. (Pa.) 584. In that case the judgment was reversed. The crime of which the defendant was convicted was perjury, punishable by fine and imprisonment at hard labor; yet, as the Act prescribed no particular kind of treatment as to diet or discipline, a sentence which adjudged that the convict shall be confined, fed, clothed and treated as the law directs, was reversed as erroneous. In the argument an exception was taken that the defendant was sentenced to 'hard labor,' the word 'hard' going beyond the letter of the Act. On inquiry, it was found that the exception was not well taken, as these words appeared in the original roll. But had it been as was assumed, we are warranted in saying the judgment would have been reversed on that ground alone. The reasoning of the judges, who delivered their opinions *seriatim*, applies with full force to the present case. But as repetition adds no additional force to an argument, I shall content myself with referring generally to the cases cited. But it is denied that the case of *Commonwealth v. Kraemer* applies; because, as is said, it was ruled on the construction of the Act of 1792, and that the question now raised depends on various Acts subsequently passed, constituting one entire system. That it is a rule of construction that statutes are not to be taken according to their very words, but their provisions may be extended beyond, or restrained within the words, according to the sense and meaning of the legislature, apparent from the whole statute, or from other statutes

created before or after the one in question. That the intention of the legislature must govern, and to this intention, a literal construction of any statute must yield; and to discover the true meaning of the statute, it is the duty of the court to consider other statutes, made *in pari materia*, whether they are repealed or unrepealed. *Church v. Crocker*, 3 Mass. 21; *Holbrook v. Holbrook*, 1 Pick. (Mass.) 254. These principles are not denied, and in the application of them the counsel for the Commonwealth insists that the Act under which sentence was passed, authorized the court to imprison the defendant in the penitentiary or county jail; that by that Act, for the establishment of penitentiaries, labor is made part of the sentence of every person confined therein; and that it is an important branch of the penitentiary system; that the courts have power to sentence the defendant to imprisonment in the penitentiary, and that labor would have been necessarily a part of the punishment; that although the legislature do not in the Act expressly authorize a sentence to labor, yet it may be inferred that it was so intended, in consequence of authority being given to imprison a defendant in the penitentiary; that it being established that labor was a part of every sentence to the penitentiary, it necessarily followed that a sentence to imprisonment in the county prison, under the act of assembly, would authorize a sentence to labor, because it must be inferred that it was the intention of the legislature to make the punishment the same, whether the confinement was undergone in the county prison or the penitentiary. This is a strict summary of the argument in favour of the Commonwealth, in which I agree there is much force; yet we think it would be attended with risk to yield to such nice speculations, as to the intention of the legislature, in a criminal case. It is better to confine ourselves to the act, which must be our guide in inflicting the punishment, which is fine and imprisonment without labor; the latter being an addition not warranted by statute. The late venerated Chief Justice never ventured to sentence a convict without having the Act inflicting the punishment before him, and his sentence was, as near as could be, in the words

of the Act—an example worthy of imitation, and, if strictly observed, would save the court some trouble, besides contributing to a more satisfactory administration of justice. But what is an unanswerable argument against the view taken on behalf of the Commonwealth, is that in some counties of the State, labor is not a part of the punishment, and the consequence would be, unless we adhere to the punishment inflicted by the Act itself, that the same offence would be differently punished in different parts of the State. This, surely, the legislature did not intend, as it is of some consequence the law should be uniform. We cannot, at any rate, infer such to be their intention, unless their meaning is so clearly expressed as to lead us necessarily to such a construction. If a prisoner sentenced to fine and imprisonment, who is put to hard labor, will have a right to complain, is a question not now before us, and it will be time enough for us to decide it when it arises."

This ruling applies without qualification to the facts presented in the case immediately before us.

NOTES OF CASES.

COUR DU BANC DE LA REINE.

EN APPEL.

QUÉBEC, 7 mai 1884.

DORION, C.J., RAMSAY, TESSIER, CROSS et BABY, JJ.

CHOQUETTE (déf. en Cour inférieure) appelant, et HÉBERT (dem. en Cour inférieure) intimé.

L'Acte Electoral Fédéral—Dépôt.

Jugé : Que lorsque dans une action pénale d'après l'acte électoral fédéral tel qu'amendé par 46 Vict. ch. 4, s. 1, un demandeur par une seule et même action demande le recouvrement de plusieurs pénalités ou amendes, il doit faire, avec son précepte, un dépôt de \$50 pour chacune des dites pénalités dont il demande le recouvrement.

Les faits de la cause sont ceux-ci : M. Hébert, notaire de Montmagny, avait intenté contre M. Choquette, avocat et candidat aux dernières élections fédérales pour le comté de Montmagny, une action au montant de

\$12,760, étant pour autant de pénalités de \$200 que le dit Hébert voulait recouvrer du défendeur et appelant. Avec son précepte le demandeur Hébert ne fit qu'un dépôt de \$50.

Cette action fut rencontrée par une exception à la forme, allant à dire qu'un dépôt de \$50 devait être fait pour chaque pénalité de \$200 comprise dans la somme de \$12,760, montant réclamé du défendeur.

L'Hon. Juge Angers déboute cette exception à la forme avec dépens, et déclara le dépôt de \$50 suffisant.

M. Choquette porta sa cause en appel et quatre des honorables juges sur cinq déclarèrent le dépôt insuffisant, l'exception à la forme bien fondée et déboutèrent l'action du demandeur Hébert avec dépens contre lui tant en Cour inférieure qu'en Cour d'appel.

A l'appui de sa plaidoirie M. Choquette cita les autorités suivantes :

37 Vict., Acte Elec. Fédéral et ses amendements, ss. 92, 109, 111, 112, 123.

46 Vict. ch. 4, s. 1.

Legal News, Vol. III, page 195, *Tarte & Cimon*.

C. C. art. 12 et autorités ci-dessous.

Voici le jugement de la cour d'appel :

"La cour après avoir entendu les parties par leurs avocats respectifs sur le mérite, examiné le dossier de la procédure en cour de première instance ainsi que les griefs d'appel produits par le dit appelant et les réponses à ceux, et sur le tout mûrement délibéré ;

"Considérant que le demandeur intimé a réuni dans son action plusieurs demandes pour pénalités et amendes, pour autant de contraventions aux lois d'élection des membres de la chambre des Communes parlement du Canada, et qu'il n'a déposé que la somme de cinquante piastres afin de garantir le défendeur appelant en cas que le demandeur intimé ne réussit pas dans sa demande ;

"Considérant que le demandeur intimé était tenu de donner caution au montant de cinquante piastres pour chacune des pénalités ou amendes réclamées par l'action avant l'institution de la dite action ;

"Considérant qu'il y a erreur dans le jugement rendu par la Cour supérieure à Montmagny le 17 novembre 1883 : Cette cour casse et annule le dit jugement et procédant à rendre le jugement que la dite cour supérieure

aurait dû rendre ; Maintient l'exception à la forme produite par le défendeur appelant, et déboute l'action du demandeur intimé avec dépens de la cour supérieure et d'appel contre le dit intimé, et la cour ordonne le renvoi du dossier à Montmagny.

" Dissentiente M. le juge Baby."

Pacaud & Choquette, procureurs de l'appelant.

Pelletier & Bédard, procureurs de l'intimé.
(P. A. C.)

COURT OF QUEEN'S BENCH.

MONTREAL, May 19, 1884.

DORION, C. J., MONK, RAMSAY, CROSS, and BABY, JJ.

ABBOTT *ès qual. et al.* (defts. below), Appelants, and MCGIBBON *ès qual.* (plff. below), Respondent.

Will—Power to divide among children—Exercise of power.

Where an estate was devised to A in trust, with power to divide among A's children in such proportion as A should appoint by his will, and in default of such appointment the estate to go to the children share and share alike : Held, that an appointment by will to certain of the children, to the entire exclusion of one or more, was a valid exercise of the power.

The appeal was from a judgment of the Superior Court, Montreal, Dec. 13, 1882, reported in 5 Legal News, page 431.

RAMSAY, J. This is an action by the tutor of Humphrey Gordon Eversley Macrae, claiming on behalf of his ward one-fifth part of a legacy under the will of the grandfather of the minor, William Macrae, as being one of the children of John Octavius Macrae, son of the testator. The clause of Wm. Macrae's will under which respondent claims is as follows :—

"I give and bequeath unto my executors hereinafter named, for the use, benefit and behalf of the children, issue of the present or any future marriage of my son John Octavius Macrae, one-third of the residue and remainder of my estate and succession, to have and to hold the same upon trust ; firstly, to invest the proceeds thereof in such securities as to them shall seem sufficient, and from time to time to remove and re-invest the same, and during the life of my

"said son, John Octavius Macrae, to pay the rents and revenues derived therefrom to my said son for his maintenance and support, and for the maintenance and support of his family. And secondly, upon the death of the said John Octavius Macrae, then the capital thereof to his children, in such proportion as my son shall decide by his last will and testament; but in default of such decision, then share and share alike, as their absolute property forever."

J. O. Macrae, on the 5th April, 1880, made his will by which he disposed of the above trust funds thus: "I will, bequeath, direct and appoint that my son John Ogilvy Macrae, and my three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, shall be entitled equally, share and share alike, to the trust fund over which I have a power of appointment under my father's will." On the 25th January, 1881, J. Oct. Macrae had a son, to wit: the said Humphrey, and on the 12th May, 1881, J. Octavius died.

It is contended that by the will of William Macrae a substitution was created in favour of all the children of John Octavius, that the *grevé* had power to distribute the fund in reasonable proportions, giving a substantial part to each, but that he could not exclude any one or more of the children, nor could he give merely an illusory sum to one or more, thus practically excluding him. That as John Oct. Macrae had excluded one of the children, he had not executed the power conferred upon him by the will of William Macrae, and that therefore the children came in share and share alike.

Appellant, on the other hand, contends that the right to distribute the fund among the children of John Octavius "in such proportion as my said son shall decide by his last will and testament," permitted John Octavius to select those of his children he chose.

Curious to say, this question of purely French law has been argued and decided in the court below without reference to a single French authority; but we have been referred to the English law as "written reason" "of the highest value." It will readily be admitted that written reason, wherever it comes from, is of the highest value, and not the less valu-

able because it is very scarce; but unfortunately the English law referred to seems to be nearly akin to unreason. It is only by the help of repeated legislation that the law there has come down to that reason from which I apprehend our law starts. It was, therefore, quite unnecessary for us to make any Act similar to the English Act, 37 & 38 Vic. cap. 37.

Under the Roman Law, and under the old régime in France, there was a great question as to the effect of the substitution of the children, or of a class, as for instance, relations, and at last it seems to have been determined, that when the children of the *grevé* were called *nominatim* they held of the original testator, and that the father could not affect the disposition. When the children of the *grevé* were called *collectively*, there was great difference of opinion as to whether the father could select among the children, so as to give to some and exclude others. Although the affirmative of the proposition cannot be supported on a strictly logical argument, it seems to have prevailed. The argument, such as it was, is as follows: The object of the testator is the governing consideration in the interpretation of wills (*Jf de Reg. jur. xii.*); creating a substitution in favour of children or of relatives indicates an intention of keeping the property in the family, therefore when the *grevé* selects one or more in the class named, but particularly among his children he is giving the most beneficial effect to the disposition of the testator. This argument is to be found in 1 Du Perier Liv. 3, Qu. 2.

The following are some of the authors who have supported the affirmative:—

"Si le testateur en faisant le fidéi-commis a usé d'un nom collectif, et sans nommer les personnes, a généralement appelé les enfants de l'héritier, ou ceux de la famille, en ce cas l'héritier est en faculté d'élire tel des substitués que bon lui semblera; d'autant qu'en cette disposition, le testateur n'a pas considéré les personnes, mais la qualité des fidéi-commissaires, laquelle se trouvant toute semblable en chacun d'eux, il est suffisamment satisfait à la volonté du défunt par l'héritier qui transporte tout l'héritage à un des substitués: *Verum est enim in familia, vel liberis*

reliquasse, licet uni reliquerit, dit Martian. Et c'est à cette espèce que les réponses de Papi-nian et autres Jurisconsultes doivent être rapportées. (Arrêts d'Olive, Livre 5, ch. xiv, p. 705.)

"Il est vrai que si le testateur n'a point appelé les fidéi-commissaires en particulier, mais en général, par un nom collectif, et que la restitution soit conçue en termes fidéi-commissaires, dirigés à la personne de l'héritier, comme s'il l'a chargé de laisser les biens à ses enfants, ou à ceux de la famille, il peut choisir entre ses enfants au premier cas, ou parmi ceux de sa famille, au second, celui qui lui sera le plus agréable, et il satisfait à la volonté du testateur, pourvu qu'il ne mette pas les biens hors de sa famille, ou s'il les laisse à l'un de ses enfants." (Ricard, Tom. II, Traité III, ch. xi, Part II, No. 63.)

It will be observed, however, that this is not exactly the question here. There is a special power given to select, and so far as I know the exercise of that power to favour one to exclude absolutely another has never suffered any difficulty. See du Perier already cited, p. 257-8: "Mais ces mêmes lois nous font voir aussi qu'il n'est pas absolument nécessaire que la faculté du choix et de l'élection soit donnée expressément par le testateur, et qu'elle le peut être tacitement, et par les conjectures tirées des termes de sa disposition et de la qualité des personnes et autres circonstances, qui montrent que l'élection favorise l'intention et la disposition du testateur, qui est une proposition d'autant plus équitable, qu'il s'en peut rarement ensuivre de fâcheux inconvénients; et qu'au contraire elle peut produire de très-bons effets...."

"C'est pourquoi encore que régulièrement l'héritier grevé n'ait point de choix et d'élection quand le testateur ne la lui a pas donnée. Cette règle doit cesser quand les circonstances de la disposition font voir que l'élection n'est point opposée à l'intention et à la fin que le testateur s'est proposée; et c'est ainsi que Berengarius Fernandus l'a entendu, et que les arrêts du Parlement de Toulouse l'ont jugé, comme il paraît par le discours de tous ces auteurs," &c.

But it may be said that giving one child is not giving each a proportion. The answer is, not strictly, but it is an exercise of the

power as substantially as if the *grevé* had given a nominal sum, which evidently he had a right to do. To adopt the notion of English equity, now abandoned, would be to involve ourselves needlessly in a labyrinth of troubles, into which we are not invited by any authority of our law. To contend that the original testator's manifest intention was to be defeated because of the failure to do what is meaningless, appears to me to be untenable under any reasonable system of law, and certainly cannot be entertained for an instant under ours.

The following is the judgment of the Court:—

"Considering that the late William Macrae, in and by his last will and testament executed before witnesses, on the 3rd of March, 1868, gave and bequeathed unto his executors for the use, benefit and behalf of the children, issue of the then present, or any future marriage of his son, John Octavius Macrae, one-third of the residue and remainder of his estate, to pay the rents and revenues thereof to his said son, during his lifetime, and after the death of the said John Octavius Macrae, to pay the capital thereof to his children in such proportion as the said John Octavius Macrae should decide by his last will and testament, but in default of such decision, then share and share alike, as their absolute property for ever;

"Considering that it is also in evidence that the said John Octavius Macrae was twice married, firstly to Dame Victoria St. George Ritchie, of which marriage there was issue four children, to wit: Lucy Caroline Macrae, now of age, and one of the defendants (now appellants), John Ogilvie Macrae, Ada Beatrice Macrae and Catherine Alice Lennox Macrae, who are still minors, and are now represented by their tutor, Harry Abbott, the other defendant (appellant); and secondly, on the 29th Nov. 1879, to Dame Mary Ann Jennay, of which marriage there is issue one child, to wit: Humphrey Gordon Eversley Macrae, born on the 25th of January, 1881, and now represented by his tutor, the plaintiff (respondent) in this cause;

"Considering that the said John Octavius Macrae died on the 12th of May, 1881, after having made his last will and testament of

date the 5th of April, 1880, whereby he directed that his son John Ogilvy Macrae, and his three daughters—Lucy Caroline Macrae, Ada Beatrice Macrae and Catherine Alice Lennox Macrae—should be entitled equally, share and share alike, to the trust fund over which the said John Octavius Macrae had a power of appointment, under his father's will;

"Considering that the said John Octavius Macrae had by law under the disposition of the will of his late father, William Macrae, not only the right to apportion between all his children as well those of his then existing marriage or of any future marriage, but also the right to dispose of said property in favor of one or more of his said children to the exclusion of the others as he has done by his said last will;

"And considering that the respondent in his said capacity has no right to any portion of the property claimed by his action, and that there is error in the judgment rendered by the Superior Court, etc., etc. This Court doth reverse," etc., and action dismissed.

Judgment reversed.

Tait & Abbotts for Appellants.

Girouard, Wurtele & McGibbon for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

DORION, C.J., MONK, RAMSAY, CROSS, BABY, JJ.

MOFFATT *vs* qual (deft. below), appellant, and
BURLAND (plff. below), respondent.

Powers of assignee of insolvent—Concealed Sale.

1. *A person holding property as trustee under a deed of conveyance from an insolvent firm is by law entitled to ester en justice for the protection of the rights conveyed to him by such deed; and accordingly in the present case it was held that such trustee was entitled to plead in his own name to an action of revendication based on a pretended sale from the insolvents to the plaintiff.*
2. *Though déplacement is no longer necessary to the validity of a sale, yet where there is no déplacement fraud and simulation are easily presumed; and where a pretended sale was a mere contrivance intended to obtain, under*

color of a sale, a security upon the effects, and thus avoid the delivery of possession which is essential to the validity of a pledge, it was held inoperative.

The appeal was from a judgment of the Superior Court, declaring the respondent proprietor of certain machinery, lithographic printing presses, etc.

RAMSAY, J. This is an appeal from a judgment maintaining a *saisie-revendication* of certain articles used in the business of lithography. The action is directed against the members of a firm formerly existing under the style of Gebhardt & Co., and against the appellant, assignee of the firm, to whom all the property has been absolutely transferred for certain purposes.

The appellant alone pleaded, setting up that the deed on which respondent relied was fraudulent and simulated as between him and Gebhardt & Co. The judgment maintained the action on two grounds; the first of which was that the plea of simulation and fraud was no answer to the action in the mouth of appellant, because he was only a trustee, and that, under Art. 19, C.C.P., no one can plead in the name of another. It is perfectly true that no one can plead in the name of another, but Moffatt pleads in his own name under the deed of conveyance to him of the rights of all the parties. He has, therefore, a legal title, and I think he can plead in his own name, and no one has an interest to raise the question, and certainly not the parties to the deed of trust, one of whom is the respondent. The case of *Brown & Pinsonneault* is not in point, and *De Chantal & Thomas* is, if anything, against respondent's pretension. It seems to me a more subtle question presents itself, and that is, how far, under a joint assignment of the kind, and representing Gebhardt & Co. as well as the creditors, the appellant can urge the fraud and simulation of Gebhardt & Co. We think he can, and for this reason—that the assignment conveyed to Moffatt the rights of the creditors, who could contest the validity of the deed between Gebhardt & Co. and Burland, and that Gebhardt & Co. being parties to the deed did not of itself affect the rights of the creditors conveyed to Moffatt.

We next come to the question of fraud and simulation. It is admitted that there was no *déplacement*, but it is contended that *déplacement* is no longer necessary under the Code, which makes the purchaser proprietor of the thing sold by the consent of parties alone, without even tradition, and much more, then, without *déplacement*. This view seems to have the express letter of the law in its favour, so that the remaining in possession by the vendor under a lease becomes only an indication under certain circumstances of simulation, and not a presumption. But in the Supreme Court, in the case of *Bell & Rickaby*,* a doctrine was held, which practically brings us back to the old rule, for there is really no difference in saying that without an effective tradition by *déplacement* the sale shall not affect third parties, and saying that where there is no *déplacement* fraud and simulation will be presumed. It is true that, in the case of *Cushing & Dupuy*,† the Privy Council did not go quite so far, and they found proof of simulation (not fraud, for it was not pleaded) in the absence of price. They said it was pledge, and the pledge was not transferred. That is, without any allegation of fraud, they said a contract was not that which the parties said it was. Although it would be possible to draw an argument in support of the opinion I expressed with the majority of the court in the case of *Bell & Rickaby*, and with the minority in the case of *Cushing & Dupuy*, I do not think this would be fair to the parties. It seems to me that both of our courts of appeal have declared themselves against concealed sales, and I am very glad they have been able to find law for it, which I willingly take from them on trust. In several cases we have applied the doctrine in the most absolute form. I may instance a case decided at Quebec; and again, recently here, in the case of *Thibaudeau & Mailly* (January, 1883), we held that, without fraud, where the object of a relative was to aid his kinsman, the deed would be considered simulated. This is going back to the old law *sans phrase*.

We are, therefore, to reverse the judgment with costs.

The following is the judgment of the Court:—

"Considering that it appears by the evidence adduced in this cause that the pretended sale by the firm of G. J. Gebhardt & Co. to the Canada Paper Co. (limited), by the deed executed before Beaufield, notary, on the 27th April, 1880, of the plant, machinery and other movable effects enumerated in the list or schedule thereto annexed, comprised the whole or nearly the whole of the stock-in-trade, plant, machinery and effects at the time in use by the said firm of G. J. Gebhardt & Co. for the carrying on of their business, and without which they could not have carried it on;

"Considering that the sum of \$5,000 which the said firm of G. J. Gebhardt & Co. thereby acknowledged to have received from the Canada Paper Company as the consideration of the said pretended sale of said plant, machinery and effects was a fictitious price, the said plant, machinery and effects being at the time worth more than double that amount, and that said sum of \$5,000 was not then actually paid by the said Canada Paper Company, and that the true consideration for said pretended sale consisted of advances partly then already made and partly thereafter to be made by the said Canada Paper Company to the said firm of G. J. Gebhardt & Co.;

"Considering that it appears by said evidence that it was understood by the parties at the time of the execution of the said deed, that when the advances so made and to be made by the said Canada Paper Company to the said firm of G. J. Gebhardt & Co. should be reimbursed, the Canada Paper Company would reconvey the said plant, machinery and effects to the said firm of G. J. Gebhardt & Co.;

"Considering that it is made to appear by said evidence and the circumstances under which the said deed was passed, that the sale thereby pretended to have been made was simulated, and that the parties to the said deed intended thereby not to actually sell but only to pledge the said plant, machinery and effects as security for the reimbursement of the said advances;

"Considering that the said parties to the said deed gave to the transaction the form of

* 2 Supreme Court Rep. 560.

† 3 Legal News, 171.

a sale in order to avoid the necessity for an actual delivery to and a possession by the pledgee of the said plant, machinery and effects, as required by article 1970 of the Civil Code, to entitle the pledgee to a privilege and preference over the property so pledged ;

" Considering that under the circumstances and without an actual delivery and possession by the pledgee of the property, the said deed can have no operation as against the rights and recourse of the creditors of the said firm of G. J. Gebhardt & Co., or to bar or obstruct their remedies in regard to it ;

" Considering that by deed executed before Isaacson, notary, on the 13th day of June, 1881, the said firm of G. J. Gebhardt & Co. and the partners thereof sold, assigned, transferred and set over and delivered up to the appellant in this cause all their stock-in-trade, goods, chattels, fixtures, plant, book-debts, notes, accounts, books of account, and all other their personal estate and effects, including the whole or what remained as representing the plant, machinery and effects enumerated in the list or schedule annexed to said deed so executed on the said 27th day of April, 1880, and including all the plant, machinery and effects claimed by and seized at the instance of the respondent under the writ of *saisie-revendication* issued in this cause, to have and to hold the same upon the trusts and for the purposes mentioned in the said deed so executed on the 13th day of June, 1881, more especially for the benefit of the creditors of the said firm of G. J. Gebhardt & Co. ;

" Considering that at the time of the issuing of the writ of *saisie-revendication* in this cause and the seizure thereunder made at the instance of the respondent, the appellant was lawfully in possession of all the moveables, effects and property claimed by the respondent, and seized at his instance under the said writ of *saisie-revendication*, and was so in possession and of right held the same under and in virtue of the said deed so executed before Isaacson, notary, on the 13th day of June, 1881, and from having had the same delivered to him in pursuance of the said deed, whereby and by reason of said delivery and possession, and the right thereby and by the said deed vested in him, he acquired

a right of property and of possession in and over said plant, machinery and effects, including those so claimed and seized in this cause, and that by priority and preference over any claim or pretention thereto on the part of the said Canada Paper Company or assigns ;

" Considering that the respondent, as a creditor of the said firm of Gebhardt & Co., was a party to the said deed of sale and conveyance so made to the appellant, bearing date the 13th day of June, 1881, and consented thereto ; and considering that the appellant is entitled to oppose to the said respondent all the objections he might have opposed to the said Canada Paper Company, and to contest the validity of the said deed of pretended sale of date the 27th day of April, 1880 ;

" And considering that the appellant is not a mere attorney, but on the contrary is vested as trustee for the creditors of the said firm of G. J. Gebhardt & Co., with all the rights purporting to be conveyed to him by the said deed executed before Isaacson, notary, on the 13th day of June, 1881, and is by law entitled to *ester en justice* for the protection of said rights ;

" And considering that there is error in the judgment rendered by the Superior Court in this cause at Montreal on the 28th day of February, 1882, the Court of Our Lady the Queen now here doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action and demand en *revendication* of the said respondent, and doth award to the appellant *main-levée* of the seizure of the goods and chattels, property and effects seized in this cause, and doth condemn the respondent to pay to the appellant as well the costs incurred in the Court below as in this Court. (The Hon. Mr. Justice Monk dissenting)."

Judgment reversed.

Dunlop & Lyman, for appellant.

S. Bethune, Q. C., and J. Doutre, Q. C., counsel.

Archibald & McCormick, for respondent.

The Legal News.

VOL. VII. JUNE 14, 1884. No. 24.

SHORTHAND WRITERS' NOTES.

It appears that the difficulty of securing with expedition an authentic transcript of what the witnesses have said, which is here found to be so formidable, has not been altogether overcome in England. There is often conflict between the shorthand writers' version and the notes taken by the judge. The question then arises, which should be accepted? In a recent case the Court ruled that a preference should be given to the full transcript made by the shorthand writer. Mr. Justice Field, however, emphatically dissents from this opinion, and protests against another Court setting aside his notes in favor of a shorthand writer's, and overruling him on the strength of that proceeding. His lordship insists that his notes are a truer record of the evidence than the shorthand report, for the simple reason that they contain nothing but what is in the strictest sense admissible evidence, and that in its most highly concentrated and pertinent form.

This is a matter determined very much by the circumstances. An inexperienced shorthand writer will give his whole attention to the mechanical work of writing, which he will do imperfectly, and hence the sad jumble of words so often found in depositions, and in the factums in appeal. A practised and intelligent shorthand writer is more likely to be correct than a judge who strives to write in long hand with any degree of fulness what the witness is saying, and who will usually be a considerable way behind the witness. But if a judge restricts himself to the salient points of testimony, his record on one of these points should, it seems to us, be preferred to the record of an unprofessional writer; though even in such a case, we admit, it is quite possible that the judge may be wrong and the reporter right. There are a dozen circumstances which are not without importance: the keenness of hearing of one and the other; their position with reference to the witness; facility with the pen, etc.

NECESSARIES FOR INFANTS.

The *Law Journal* (London) notes a curious case, *Lang v. Guthrie*, tried on the 23rd of May, before Mr. Justice Manisty and a special jury. It was an action by a gunmaker to recover the price of a pistol and two air-guns sold to the defendant. The plea was that the defendant was an infant. It appeared that the defendant ordered the goods while a minor, but the plaintiff having received an intimation that the purchaser was not yet of age, refused to deliver them until the defendant came of age, and then delivery was made upon his written order. The plaintiff, it would seem, was clearly entitled to recover under the circumstances, the fact that an order had been given previously during minority and not acted upon, having no bearing on the case; but the curious feature of the trial is that the jury found that the pistol was a necessary for an infant, and the learned judge is reported as saying that he agreed with the jury! If we had found this case in our contemporary, the *American Law Review*, it would seem quite in the ordinary course of affairs—the juries of Missouri would doubtless cling to so reasonable a doctrine, but for an English jury it is a little strange, and we are inclined to suspect that his lordship at least was not fully understood.

THE MODERN LEGISLATOR.

The modern Quebec legislator is a remarkable person. Discovering a deficiency in the chest he institutes a commission to find out how to economize. The three commissioners immediately run up bills amounting to several thousands of dollars each, besides liberal drafts for travelling expenses; and the two secretaries do the same. This is only an inquiry as to civil service expenditure—a matter with which the heads of departments might be supposed somewhat conversant. Then grants to charities and similar objects are cut down 20 per cent. But the modern legislator ends by discovering that he is a more distressed creature than hospital patients, and he votes himself as extra pay for the session \$200, or \$17,800, for there are 89 of them—a sum considerably larger than was economized from the hospitals. Herbert Spencer has been studying and writing upon “the sins of legislators.” It is evident that he made a great mistake when he passed by Quebec in the course of his investigations.

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, May 31, 1884.

Before JOHNSON, PAPINEAU and BUCHANAN, JJ.

LAVOIE, Petitioner, and GABOURY, Respondent, and LEBLANC, put in by answer to the petition, and ALDERIC OUMET, recipient of notice.

Laval Election Case—Quebec Election Act of 1875—Corrupt practice—Grounds for personal disqualification of candidate—Counter petition—Election—Notice to person charged with corrupt practice.

1. *Where the evidence of a corrupt promise by the candidate is contradicted in important particulars, and the candidate wholly denies it on oath, the Court will not base thereon a judgment of personal disqualification.*
2. *The payment of money by an agent to a canvasser will not be held ground for personal disqualification, unless it be shown that the candidate was aware of such payment.*
3. *The payment by the candidate himself of a sum of money for election purposes to a person concerned in his election, is a matter to be judged by the circumstances attending such payment, and where the payment in question was made to a person strongly in favour of the candidate, and who required no inducement to support him, it was held no ground for personal disqualification.*
4. *Until the exigency of the original writ of election is satisfied there is no election, and the several elections are considered one and the same election, even though the seat is not claimed for any one.*
5. *Under sections 272, 273 and 274 of the Quebec Election Act of 1875, a regular summons to a person charged with a corrupt practice to appear at a place, day and hour fixed, must be issued. If the party fails to appear, he may be condemned on evidence already adduced on the trial of the election petition, but if he does appear, the case is to go on as an ordinary case, and the judgment is to be given on evidence then to be adduced.*

JOHNSON, J. In this case the Court is called upon to give effect to statutes of the Parliament of this Province, that is to say, the

Quebec Election Act of 1875, and the Controverted Elections Act, with their amendments of the same year; and we are called upon to do this, not only on the main issue between the petitioner and the respondent, but upon the recriminatory charges brought by the respondent in his turn against Mr. Leblanc, who had been a candidate at the previous election and was also a candidate at this one, which for the purposes of the present case has been assumed to form part of the election of 1883—the first having failed to return a candidate who could hold the seat, and the two, therefore, being taken together as constituting one and the same election; and we are also called upon to apply the law with reference to the proceedings incidentally taken by the respondent against Mr. Oumet professedly under sec. 270 of the Election Act.

Mr. Felix Lavoie, the petitioner, asked by his petition that the election of the respondent for the county of Laval should be set aside on all the grounds that could be alleged under the law; and it further prayed for the personal disqualification of the respondent for acts of corruption committed with his personal knowledge and participation.

This petition was filed on the 19th of July, and served on the respondent upon the 21st July, and he appeared by his attorneys on the 26th; and on the 27th July he filed his answer, which he intitled, *Réponse, contre-pétition et mise en cause.*

A question was raised as to whether the answer was in time; but that question has no importance with reference to the main issue on the petition itself—and obviously so—because the law says that if the answer is not filed in proper time, the issue is to be considered joined without an answer. Therefore, the motions made to get rid of this answer as filed too late will be considered by-and-by with reference to other interests, viz: with reference to the interests of Mr. Leblanc and Mr. Oumet whom, by this answer, or by means of the demands accompanying the answer and produced and filed with the answer, it was sought to put into the case; and that part of the case need not be further noticed now. It will suffice to say the answer to the petition was a general denial of its allegations—the rest of it, or of

what was produced along with it, related to what was alleged against Mr. Leblanc and Mr. Ouimet, and will be noticed at the proper time, when we get to that part of the case.

Admissions were made by the parties, which considering their importance, both as to the general facts of the case, and particularly as to the connection between the election of 1882, and that of 1883, it is well to refer to. They were as follows:

"Pour éviter à frais, les parties admettent :

"Qu'une élection d'un membre à l'Assemblée Législative de la Province de Québec, pour le district électoral de Laval, dans le district judiciaire de Montréal, a eu lieu, en vertu de la loi dans le dit district électoral, dans le courant du mois de juin 1883, et que la présentation des candidats ayant été fixée au six de juin 1883, a eu lieu ce jour-là à Ste. Rose, dans le dit district électoral de Laval, dans le district judiciaire de Montréal, et que la votation ayant été fixée au troisième jour de juin 1883, a eu lieu ce jour-là, dans le dit district électoral de Laval ;

"Que le défendeur, et Pierre Evariste Leblanc, avocat, de la cité et du district de Montréal, se sont portés candidats et ont été mis en nomination à la dite élection et sont demeurés tels candidats durant la dite élection ;

"Que d'après le compte des votes fait par les sous-officiers-rapporteurs, et d'après la vérification des états par eux préparés, faite par l'officier-rapporteur, le dit Amédée Gaboury se trouvant à avoir la majorité des votes données à cette élection, a en conséquence été proclamé élu député, pour représenter le dit district électoral de Laval ;

"Que le dit officier-rapporteur a fait son rapport en conséquence au greffier de la Couronne en Chancellerie pour la Province de Québec, lequel a publié le nom du dit Amédée Gaboury, comme candidat élu député pour le dit district électoral de Laval, dans l'édition ordinaire de la *Gazette Officielle* de Québec, le vingt-troisième jour de juin 1883, conformément à la section 213 de l'acte électoral de Québec ;

"Que le pétitionnaire était et est électeur habile à voter, et ayant droit de vote à la dite élection à laquelle la présente pétition se rapporte, et que son nom était inscrit sur les listes électorales qui ont servi à la dite élection, et qu'il était encore, lors de la présentation, habile à voter à l'élection d'un membre de l'Assemblée Législative de la Province de Québec, et que de fait le dit pétitionnaire a voté ;

"Qu'une élection eut lieu dans la dite division électorale de Laval pour l'Assemblée Législative de Québec, le vingt-trois et le trentième jour d'octobre 1882, étant respectivement les jours de la nomination et de la votation ;

"Qu'en la dite élection le mis-en-cause, Pierre Evariste Leblanc, écuyer, avocat, de Montréal, fut un des candidats et Benoit Bastien, écuyer, entrepreneur, de St. Vincent de Paul, l'autre candidat, le dit Leblanc, ayant été rapporté comme dument élu ;

"Que le retour du dit monsieur Leblanc fut contesté, son élection déclarée nulle et irrégulière, à raison des manœuvres frauduleuses de ses agents, sur admission du dit Leblanc, par la Cour Supérieure du district de Montréal, siégeant en révision, le vingt-cinq mai dernier, et que l'élection contestée en la présente cause a eu lieu pour remplir la vacance créée par le dit jugement ;

"Que le dit Evariste Leblanc, écuyer, avocat, de Montréal, et mis en cause, est la même personne qui a été candidat dans les deux dites élections."

Soon after going into evidence, it was admitted that the facts proved by petitioner were sufficient to avoid the election; after that, the evidence on the main issue was directed to establish the personal acts and

knowledge of the respondent which might have the effect of disqualifying him. This latter question, then, is the first to which we shall have to direct our attention.

If we looked only at the printed *factums* of the petitioner and the respondent we should find the case of Charette was the only one relied upon. That charge, shortly stated, was that Dr. Gaboury met Charette at Ste. Rose one Sunday afternoon, between the day of nomination and the day of voting; Charette asked him if he had seen Dr. Ouimet, and Dr. Gaboury while answering in the negative, enquired why Charette wanted to know; that Charette answered it was for a case of child-birth; whereupon the respondent said: "I will go, if you will vote for me." Charette swears that he understood the attendance of Dr. Gaboury was to be given gratis, and that the respondent used the words "*Je m'en vais y aller; moyennant que vous votiez pour moi, je ne chargerai rien.*" Dr. Gaboury denies all this *in toto* upon his oath; but besides this, we are all of opinion that the evidence shows conclusively that Charette is mistaken, to say the least; the time of the arrival of Dr. Gaboury at Ste. Rose, and the time when Charette went to get Dr. Ouimet, making it perfectly impossible that the meeting between him and Dr. Gaboury should have occurred as he says it did, and without going further, therefore, into the discussion of this particular charge, we all think it would be impossible, in the face of the respondent's sworn denial, and of the contradiction of his statement in some most important particulars, to base a judgment of personal disqualification upon his evidence, even if there were no further testimony as to his credibility at all.

We therefore find that this charge is not proved.

I have said that this charge of a corrupt promise made to Charette was the only one contained in the printed *factums*; but at the argument of the case there were other cases also that were argued to have the effect of disqualifying the respondent; and the next charge that was urged before the court was the case of Tremblay, to whom Mr. Mercier paid \$81.26 for copying lists and for travelling expenses. No doubt, under s. 278 of the Quebec Election Act,

this payment was prohibited unless it were made through an agent whose name and address had been declared in writing to the returning officer; but it should be observed that Tremblay was not an elector; and there is nothing to reach the candidate, as to knowledge of that payment. There is evidence enough to show that the candidate paid money to Mr. Mercier, and that the latter paid to Tremblay; but none to show that the candidate knew that Mercier so paid the money; and if it had been made by Papineau himself, who was a duly appointed agent, and appears indeed to have been the only duly appointed agent of the candidate, it could not have been considered an unlawful payment. This payment was included in the account of legal expenses which Mr. Papineau, the agent, afterwards approved; and if, instead of the money having been paid by Mercier and approved by Papineau, it had been paid by Papineau himself, the proceeding would have been an unobjectionable one. It was said that under the amendment of the law (39 Vict., sec. 19) a payment to a canvasser was made a corrupt practice. So it was; but it is not clear that Tremblay was a canvasser; and if it were, the payment by Mercier without Gaboury's knowledge would not reach to disqualify the latter, but merely to avoid the election which was already done by the admission of the candidate.

The next case in respect of the disqualification of respondent was the case of Beaubien. All that was urged against Mr. Beaubien was that he had received money from Gaboury to influence the election. The fact is that Papineau the agent sent him \$50, and being a cautious man he returned it, considering rightly that the agent was the proper person to pay lawful expenses. Therefore, there is nothing in this particular charge at all.

The remaining charge, although not mentioned in the factums, was put very clearly by Mr. Boisvert, for the petitioner, at the argument, and it consisted in the payment by Mr. Gaboury himself to Mr. Mercier, of a sum of \$100, to promote his election. Section 249 of the Quebec Election Act (c. 7.) defines corrupt practices. It says among others in sub-section 3, of 249, "every person who di-

rectly or indirectly by himself, or any other person on his behalf, makes any gift, loan, offer, promise, procurement or agreement, as aforesaid to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in the Legislative Assembly, or the vote of any elector at any election," is a corrupt practice. What is charged against Mr. Gaboury on this head is that he paid this money, (call it gift, loan, advance, or anything else,) to induce Mr. Mercier to procure his, (Gaboury's,) return. I think we cannot be too careful to distinguish what this charge is from what it is not. It is not that, in contravention of section 278, the money was paid otherwise than through an agent declared to the returning officer. That would be unlawful, no doubt, and subject by that section to a penalty; but the charge is that the money was paid, as I have said, to induce Mr. Mercier to procure the candidate's return. That, of course, is a matter of fact to be judged of from the evidence of the circumstances. Now, if there is one thing conspicuously certain throughout this whole lamentable, and I must say most abusively long contestation, it is that Mr. Mercier was neither in a condition to require any inducements of the sort — nor Mr. Gaboury to attempt any such inducement. Mr. Gaboury, if I am not using too plain terms, as I hope I am not — and I certainly do not mean to do — Mr. Gaboury was Mr. Mercier's candidate. How wide from the fact, then, the notion must be that the money was paid to get what Gaboury had got already! What inducement could be required? Why, Mr. Mercier came there for no other purpose than to support him. P. 259, see Mercier's evidence: "C'est moi qui est allé me mettre à son service." Again, if this man is to be disqualified it is for having knowingly committed some corrupt practice. Now the payment denounced under s. 278 is certainly not a corrupt practice under the act. Sec. 248 says "any act or offence punishable under any of the provisions of sections 249, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261 and 262 shall be a corrupt practice within the meaning of the present act and of the Quebec controverted elections act, 1875." And sec. 267 gives us the consequence (viz., disqualification) of the commission

of corrupt practices by a candidate, not the consequences of an unlawful act, subject as this may have been, to a penalty, and declared, by the express enumeration of the sections I have quoted as constituting corrupt practices, *not to be one* of them. If any serious discussion has been rendered necessary of this particular charge it is because the language of Mr. Mercier as a witness was inaccurate. He said he had borrowed this money from the candidate, and yet that he never intended to return it. This must have been said to cover the real transaction whatever it was. Now it was not a loan, no doubt. It was a payment or an advance of money for election purposes—prohibited certainly by sec. 278, and for that reason, therefore, spoken of as a loan, perhaps,—but unless it was made to induce Mr. Mercier to procure the candidate's return, even though it was employed by Mercier for that purpose, it could not have operated as any inducement *quoad* him. The plain words of sub-section 3 are directed against candidates buying the support of others by money, and it is quite plain from all the facts of the case that when Mr. Mercier went down to this county, no inducement was required to make him support Mr. Mr. Gaboury. On the contrary. The two candidates were both of the party opposed to him in provincial politics. He chose the one he preferred. Gaboury was his creature—(I don't mean it offensively); but certainly Mr. Mercier was not the creature of Mr. Gaboury. The money may have influenced others—but it did not influence Mr. Mercier—which is the gist of the offence charged.

We now come to another part of the case: The respondent, with his answer to the petition, made charges, as I have already observed, against Mr. Leblanc, a candidate at both elections, and also made charges against Mr. Ouimet, who had not been a candidate at all, but merely an agent for Mr. Leblanc at the first election. We will deal first of all with the charges against Mr. Leblanc; but before coming to the charges themselves, I must notice two objections that were made. The first was that this answer and its accompaniments came too late. Speaking for myself and for Mr. Justice Papineau, we both of us consider that the answer was too late.

We think it ought to have been made within the five days, and that where there are no preliminary objections (and here there were none), there is the same time, and only the same time given to produce an answer to the petition. That, however, would not, in the opinion of any member of the Court, affect the counter demand produced at the same time. We, therefore, hold that Mr. Leblanc, as far as the time of filing the counter demand is concerned, is properly before the Court; and he appeared and answered the charges, and we have to consider them, as far as that objection goes. The second objection related to the question whether the two elections were to be considered as one. The general principle, and the one that was acted upon in the *Argenteuil* case, upon the authority of Lord Coleridge in the *Launceston* case, is that, until the exigency of the writ of election is satisfied, there is no election. It was contended for Mr. Leblanc and for the petitioner, that this principle only applies where the seat is claimed; and upon the authorities cited from the English books which are applicable to the English statute, that is so; but are those authorities applicable to our Statute? Sec. 55 of the Quebec Controverted Elections Act says: "On the trial of a petition, the respondent may give evidence to show that any other candidate has been guilty of corrupt practice in the same manner, and with the same effect as if he had himself presented a petition complaining of such election, or of the conduct of such candidate. But before entering into such proof, the respondent shall give notice thereof to such candidate, if he be not already in the case, who may cross-examine the witnesses against him, and produce others on his own behalf."

The English Statute, in Section 23, which relates to this point there, says: "On the trial of a petition under this Act complaining of an undue return, and claiming the seat for some person, the respondent may give evidence to prove that the election of such person was undue in the same manner as if he had presented a petition complaining of such election." Besides the difference between the two statutes in this respect, we find that provision has been made in our statute for security for costs being given to the candidate not elected whose

conduct is complained of: vide sec. 26 of the Controverted Elections Act. By this section the petitioner must give security of four kinds. The 1st, 2nd and 3rd relate to other persons, but the 4th says the petitioner must give security to the *candidate not elected whose conduct is complained of*.

Now this must obviously apply to such a case as the present. The petitioner, Mr. Lavoie, complains of the conduct of Mr. Gaboury. Mr. Gaboury, in his turn, complains of the conduct of the candidate not elected. Call Mr. Gaboury petitioner or counter petitioner, the candidate not complained of by Lavoie could not ask security from him: Lavoie has nothing to say to the candidate not elected; it is the other who alone complains of his conduct and would appear to be required to give security, and Dr. Gaboury himself calls his answer 'Réponse, contre pétition, &c.' Therefore, whether he actually gave security or not, or whether he was called upon to give security, has nothing to do with the point, which is whether provision has been made for security being given to a candidate not elected whose conduct is complained of. If such provision has been made it must apply to such a case as this, which must, therefore, be held to have been contemplated by this section as well as by the express words of sec. 55. But if any doubt could be entertained on this point it would be set at rest by sec. 6 of the Quebec Election Act. The words of that section are: "An election petition is a petition complaining of the undue return or undue election of a member, or of no return, or of a double return, or of any unlawful act of any candidate not returned." So that we have Mr. Leblanc before us under the very words of our Statute, and we must deal with the case charged against him.

The first case alleged against Mr. Leblanc is that of Champagne, for money paid to him on behalf of Leblanc by Mr. Ouimet in 1882 on account of the election of 1882. We ought to observe that in the election of 1882, between Bastien and Leblanc, the latter had no regularly appointed agent. Mr. Boisvert explains that he may have been considered the agent, but in reality never was—there never had been any appointment made. Coming back to the case of Champagne, we will only say that whoever may have paid him the money, there is no knowledge proved on the part of Leblanc.

The next case is that of Cleroux. The charge here was that Leblanc personally paid him \$123. Cleroux himself says that he took voters to the poll; but there is nothing to negative Leblanc's own account of the matter on his oath; and he says it was for his personal expenses, he having been in the county previously, and having always em-

ployed Cleroux to drive him about, and Cleroux also swearing that he had charged nothing for those he drove to the poll. No money can by law be paid otherwise than to the regular agent, except for personal expenses, and though Cleroux drove persons to the poll, there is nothing to show that he got the money for that purpose, and he denies it, and we think the money is fairly proved to have been paid for personal expenses.

The next charge is that Leblanc paid \$2 for a treat to St. Amour, who kept an inn. Leblanc swears this is not true. He paid the money for personal expenses, having dined there. We consider that the circumstances do not show any corrupt intent.

The case of Charles and Ludger Therien is the next one that is urged against Mr. Leblanc for having treated at a committee meeting. In this case we consider that the evidence shows the money paid was not more than sufficient for the use made of the house; and in making arrangements for the use of the rooms, no liquor was ordered. One of the Theriens says also, that when the payment was made it was not made for liquor.

The cases of Leon Dugas and Pascal Ouimet come next. This is another case of alleged treating, and, applying the same principles, we consider that there is nothing in the nature of corruption proved. It was a committee meeting, and the treating, if it is to be so called, was a treat volunteered by the keeper of the house.

Seraphim Bastien's case comes next. He says Leblanc promised him money through Bellerose, if he would work for him. He is entirely unsupported; Mr. Leblanc denies it on oath, and Bastien's testimony is, besides, impeached by Benj. Dion, fils, and others.

The next case brought forward was the case of Pascal Ouimet. Besides the so-called treating there was a payment of \$5 made to Pascal Ouimet through Boisvert for the use of the room used by the committee. He was asked to make his account. He said it was very little, they might give what they liked, and Boisvert gave him \$5. Under the view we have taken of Dr. Gaboury's case, this was an unlawful payment, for Boisvert was not his regular agent for the election; but certainly it is not a corrupt practice. The consequence of this holding will be considered by-and-by, as to costs.

Then there was a case urged, where Leblanc was charged with paying a treat to Jn. Ba. Auclair. This again occurred at a committee meeting. Auclair was opposed to Leblanc, and tried to get him to treat those present, and himself began by treating, which Leblanc returned. Auclair's account of the matter is very succinct. He says, speaking of Leblanc and St. Amour, "they did not try to influence me." We think there was no corrupt treating here.

The next case mentioned in the papers is that of Fleurant, but nothing was said about this case at the hearing.

The case to which the greatest importance seems to be attached is that of Eusebe Laurin. This was said to be undue influence exercised by paying Laurin money to engage men to go to the poll on nomination day to "keep order" as it was called. The money was paid by Mr. Ouimet; it was employed in part at least for some such purpose, and the balance was offered back to Mr. Ouimet, who said, "restez tranquille. On règlera plus tard." There is nothing to connect Leblanc with this proceeding. There was some misapprehension as to whether this money was offered to Mr. Ouimet or to Mr. Leblanc, but must have been to Mr. Ouimet. Laurin's evidence makes this certain. He says at page 98 that the language used was as I have mentioned, adding: "Comme je vous ai dit tantôt." Looking back to what he had said before, and to which he refers, we find (p. 74) that it was Mr. Ouimet who said this, and not Leblanc. We are not called upon to say whether this money was used corruptly or not as long as Mr. Leblanc is not shown to be connected with the payment of it.

The next case is that of Camille Leclaire. This was an alleged promise of a place to Leclaire to induce him to vote for Leblanc, and also the subsequent giving of a place to him to recompense him for his work in the election of 1882. All that is proved is that Mr. Ouimet was using influence on one occasion with Mr. Mousseau to get him to fulfil the promise of a place previously made by Mr. Loranger, who had represented the county; and Mr. Leblanc, who was not even a candidate at that time, happened to be present. We therefore consider that the recriminatory demand made against Mr. Leblanc in these particulars is unfounded.

Then there is a general pretension that there was an organization to supply money for this election, and that Mr. Leblanc must have known of it. We are of that opinion also; but to that extent merely; and no further. There is no evidence of his personal knowledge of the manner of using that money, except where some of it was used lawfully. For instance, he must have known that money was supplied by Mr. Hughes. He himself got some, and paid part of his deposit with the returning officer, as he might legally do, with money he got from Mr. Hughes and Mr. Ouimet; but he is not connected personally, as far as we can see, with any objectionable or corrupt expenditure of that money. We therefore acquit Mr. Leblanc of the charges in the counter-petition.

The next part of the case relates to the proceeding taken by Mr. Gaboury against Mr. Ouimet. This, too, was taken at the same time, and was produced with the answer and served upon Mr. Ouimet, who appeared under

reserve, and moved to reject the demand made against him, and which prayed for his disqualification. That motion was granted by Judge Mathieu, and we all agree it was properly granted. Another notice, with a copy of the bill of particulars against Mr. Leblanc was afterwards served upon Mr. Ouimet, and that notice was allowed to remain in the record for whatever it might be worth. There appears to have been some misapprehension as to the ruling of Mr. Justice Papineau upon Mr. Ouimet's motion to reject this second notice. However that may be, we have now to consider whether the section 270 of the Quebec election act reaches Mr. Ouimet, who is not alleged to have been a candidate at the election of 1882; but merely to have acted in the interest of the candidate who was Mr. Leblanc. The sections of the act to be looked at are from 269 to 274 inclusive. Sec. 269 disqualifies any candidate who may employ any person as a canvasser or agent, knowing that such person has, within eight years, been found guilty of any corrupt practice by any competent legal tribunal, or by the report of a judge.

Sec. 270 disqualifies *any person* found guilty of any corrupt practice in any proceeding in which, after notice of the charge, he has had an opportunity of being heard.

Sec. 271 merely relates to the cessation of the incapacity *where* such person is disqualified upon the testimony of witnesses subsequently convicted of perjury.

Sections 272, 3 and 4 supply the means to be used and the proceedings to be taken before a party can be found guilty of corrupt practices, entailing both on himself as well as on the candidate who may employ him, consequences so serious and so penal. The majority of the court think that these sections must be taken together. We find that under 272, 273 and 274 a regular summons to appear at a place, day and hour fixed, must be issued. We find that if the party fails to appear, he may be condemned on evidence already adduced on the trial of the election petition; but that if he does appear, the case is to go on as an ordinary case, and judgment, after hearing, is to be given on evidence then to be adduced. We find it difficult to conceive that all these safeguards should be provided if the party could be found guilty after a mere ordinary notice. We think that the words "after notice" in this section are mere matters of course, signifying that no judgment finding a person guilty of corrupt practices could be rendered without notice. We are strengthened in this view by the fact that our sections 272-3 and 4 are not found in any of the provisions of the English Statute. The English statute, however, does contain very much the same provision as our section 270. The Parliamentary elections act of 1868, sec. 45, provides that "any person other than a can-

didate found guilty of bribery in any proceeding in which after notice of the charge he has had an opportunity of being heard (the same words as our English statute) shall be disqualified; and in the *Bewdly* case (1 O. & H. 176) Blackburn, J., held that the mere report of a judge did not disqualify an elector under sec. 45. He said: "The report of a judge is not a determination of the case, except incidentally. He has only to make a report, and it can hardly be said that that is the same as finding a man guilty."

This decision of Blackburn, J., was referred to with approval by the select committee appointed in April, 1870. In the opinion of the committee the distinction between 'found guilty' and reported guilty is substantial and not formal.

Again, the sec. 3 of the amendment of the Quebec Controverted Elections Act of 1875 provides for certain cases where agents may be condemned jointly and severally with the respondent to pay costs. Even in such cases as that, the judge is ordered to summon the agent, and if he does not appear he may be condemned on the evidence already adduced; but if he does he can only be condemned upon evidence and after hearing as in an ordinary case, and in the same way as provided in sections 272, 273 and 274. If such are the care and circumspection of the law with respect even to a condemnation for costs, we may well conclude that we do right in exacting at least the same, before we disqualify any man from sitting in Parliament or holding office under the crown.

The result, then, of our labours in this protracted case need now only to be shortly stated. We avoid this election, and to that extent grant the prayer of the petition, with costs against Dr. Gaboury up to the time of his admission of the sufficiency of the evidence to justify that decision. With respect to the proceeding of the petitioner to disqualify Dr. Gaboury, we dismiss that part of the prayer of the petition; but with respect to costs, exercising the powers conferred on us by sections 123 and 124 of the Election Act, we consider that although Dr. Gaboury is not disqualified, the proceedings against him for that object are far from being capable of being considered vexatious; but rest upon *prima facie* grounds. He made an illegal payment to a person other than his regularly appointed agent—a payment which has led to the principal difficulty in deciding this case; and we condemn each of the parties to that part of the case to pay his own costs. As regards the contest between Dr. Gaboury and Mr. Leblanc respecting the conduct of the latter—the recriminatory demand of Dr. Gaboury is dismissed, each of the parties also paying his own costs.

Finally, as respects the charges against Mr. Ouimet, a majority of the court holds that he

is not before the court at all, and being in the position of a man who has been improperly brought here, we dismiss the charges against him, and he is entitled to his costs against the party who brought those charges. We hold, (that is, Mr. Justice Buchanan and myself hold,) that there is all the difference possible between saying that a man may be found guilty after notice, and saying that the notice alone can put him upon his trial, especially when we find the precise mode of proceeding presented in the next section but one. We think with Blackburn, J., that there is a substantial difference indeed between finding a man guilty, which would subject him to the penalties of guilt, and reporting what the evidence may *prima facie* prove against him—upon which report a prosecution might afterwards lie in which he could defend himself. But we can report without any notice; whereas we hold we cannot find guilty upon a notice alone, and set aside the prescribed mode of procedure in the statute. We say, therefore, that Mr. Ouimet has been proceeded against with a view to his disqualification illegally, and that having to appear and show the illegality of that proceeding, he is entitled to his costs against the party who took that proceeding, and we condemn Dr. Gaboury to pay those costs.

The Court desires to add one word—not of complaint, nor yet exactly of remonstrance—both of them words that are unpalatable; but we feel that some observation is called for on professional and on public grounds with respect to the useless and extraordinary complexity and confusion of these proceedings. Two heavy folio volumes of evidence, without division or classification of subjects, would seem to be too much to require as a general thing in order to reach the truth in a Provincial election petition. The hearing of this evidence, easily and advantageously reducible to one-third of its present bulk, took one judge of this court very nearly two months from the performance of his ordinary duties, while to say nothing of incidental motions and arguments requiring the services of three other judges at various times, the present members of this court have been sedulously intent, for one whole week, to the exclusion of all other business, upon the grounds of final investigation and decision of this case. If the exact measure of justice, under such circumstances, has not been awarded in every sub-detail of the endless intricacies of this case, the fault will not have been entirely ours.

Election annulled.

Boisvert for Petitioner.

Trudel & Co. for Respondent Gaboury.

Boisvert for *mis en cause* Leblanc.

Cornellier for Ald. Ouimet.

In the case of *Choquette & Hébert* (p. 178) Dorion, C.J., did not sit.

The Legal News.

VOL. VII. JUNE 21, 1884. No. 25.

RAILWAY IN STREET.

In the present issue we report the case of *The Montreal City Passenger Railway Co. and Parker*, in which it was held, that where a railway in a street of a city is properly constructed and operated, the company are not liable for damages caused by the wheel of a vehicle coming into collision with the rail. A similar principle was laid down by the Supreme Court of Illinois in a recent case—*Chicago & Eastern Illinois Railroad Co. v. Loeb* (March 26, 1884), noted in the *Chicago Legal News*. The ruling of the Court was that a railroad track laid upon a street of a city by authority of law, properly constructed, and operated in a skilful and careful manner, is not in law a nuisance, which is abatable. A railroad, or the operation of it, is not to be and should not be abated. It is built for the accommodation of the public: this is the object which justifies the exercise of the power of eminent domain; and the public welfare demands that there should not be a discontinuance of the operation of a railroad.

EXECUTION OF CRIMINALS.

We think, says the London *Spectator*, it to be demonstrable that so long as the sentence of death is retained—that is, so long as the nation retains its present creed, and feels for society more than for the individual—three conditions as to the method of inflicting it should be resolutely maintained. The mode of execution adopted should be sudden, it should visibly shatter the corpse as little as possible, and it should be held by opinion to be itself disgraceful, and no method except hanging fulfils all those conditions. Sudden death, could, of course, be inflicted in a hundred ways, many of them more rapid than the noose. Shooting, if the heart is pierced, or the brain, is probably as rapid as any. The guillotine is swifter than the hangman, despite some doubts as to the instantaneous loss of the victim's consciousness, and it

would be easily possible to employ agencies more rapid than either. There are poisons too rapid in their action for pain, and one of them could be administered, we believe, during sleep. Electricians can prove, we are told, that the electric fluid moves more rapidly than sensation does, and hold it therefore probable that an electric shock sufficient to kill instantly would never be felt by the criminal at all, death preceding sensation, a view borne out, so far as such views can be, by the usual testimony of those who have received and survived a stroke of lightning. Any one of these methods, therefore, would be as satisfactory, so far as the suddenness and the absence of any approach to torture is concerned, as hanging; but the first two diminish that respect for the body which the whole history of brutal assaults shows it so necessary to maintain, and which is, we think, the true objection to that ghastly but painless mode of execution, blowing from a cannon; and the third is liable to make an objection of its own, that it is not wise to make death for crime much more painless than natural death usually is. We should not make it painful, but we should not artificially reduce its terrors. The awe with which the punishment is regarded would be gravely diminished by the use of painless poison, such as Athenians used, while a new doubt would be begotten among the ignorant as to the reality of its infliction. They would begin talking of strong sleeping draughts, and of the drugs which could produce apparent death—that is, catalepsy—without actually killing. It is most important that no colour should be given to such stories, and important, too, not to degrade science by making it an accomplice in the executioner's task, as it would be if the electric battery were employed. Men ought not to lose the sense that there is something rough and brutal about capital punishment, that it is essentially a last appeal to force in its most direct and savage form, when every other means appear from experience to have failed. We greatly doubt, moreover, whether the multitude would believe in the painlessness of death by electricity, and whether the lightning stroke would not evoke that shudder of sympathy with the condemned which so utterly "demoralizes the guillotine," and which the idea of torture, in

this at all events, never fails to elicit in England. There would be too much the air of a scientific experiment in every execution, and a single instance of failure would, till the rapid increase of murder recalled the people to themselves, be fatal to the punishment of death.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

THE MONTREAL CITY PASSENGER RAILWAY CO. (def't. below), Appellant, and PARKER (plff. below), Respondent.

Montreal City Passenger Railway Company—Obstruction authorized by law—Liability for accident.

Where an accident occurred on the track of the Montreal City Passenger Railway Company, and it was proved that the rail was laid as required by the charter of the Company, and that the roadway at the time of the accident was in good order: Held, that the plaintiff could not recover for an accident caused by the wheel of his vehicle catching on the raised part of the rail.

DORION, C. J., (*dissentiens*) said the case appeared to him to be entirely a question of evidence, and after hearing the case twice argued he was unable to concur in the judgment of the majority of the Court.

RAMSAY, J. A very important question arises in this case, and it is the nature of the appellant's liability. It cannot be questioned, I think, that a tramway, in a street used for other vehicles, must be a source of danger; but it does not follow from that, that every accident caused by this increased peril must be put to the company's charge. They have certain powers conferred by law, and if they only exercise these powers in a lawful way, those who come in contact with them do so at their peril. We have therefore to inquire whether the construction of the railway was in conformity with the law, and whether it was in good order. It seems to me that both of these questions must be answered in favor of the company, appellant. The terms of

the Act of incorporation authorized the use of a flat rail, of the Philadelphia pattern, modified according to the by-law of the municipal corporation, and that was the form of rail adopted. It is also established that the raised part of the rail, which all respondent's witnesses evidently considered as the immediate cause of the accident, was that used in Philadelphia and sanctioned by the corporation there, and is a necessity to keep the railway car on the track. There was some attempt to prove that the road beside the track was not in good order; but it is quite clear the accident took place on the rail, and not between the road and the rail. It seems to me clear that the hind wheel of the waggon struck the raised part of the rail, and instead of passing over, slipped into the wheel track, and, being caught as in a vice, was twisted off.

Again, the testimony of those who said the road was in bad condition is not very convincing, and is satisfactorily contradicted. It was attempted to make some show of proof that the company, sensible of its wrong-doing, had hurriedly repaired its line. The little evidence in support of this breaks down from want of precision. The inspector of the road says it is not true, but that the road was repaired a few days before and a few days after as usual, and he tells us that it is repaired constantly in this way. The majority of the Court is to reverse with costs.

MONK, J., remarked that his first impression was that the case did not admit of much difficulty, and, after a very careful reading of the evidence, he came to the conclusion that the action was completely unfounded. The track of this railway might be an obstruction and inconvenience, but it was an obstruction permitted by the law. It was established that the rails were laid according to the mode of placing them in Philadelphia. There was no pretension, in fact, that the mode of laying the rails was different from that prescribed by the law. Then, again, it was proved that the road was in perfectly good order. People had been crossing the road at this place over twenty years; it was the same rail that was first laid, and no accident had ever happened. The waggon on which the plaintiff was sitting must have been going too fast. It was im-

possible to suppose that he could have been precipitated twenty feet if the horse was going at a walk.

The judgment is as follows:—

"Considering that on the 25th day of June, 1881, the appellants were not in default or in the wrong as regards the quality or pattern of the iron rails they had used in the construction of their railway at the south-western corner of the Place d'Armes, where the said railway makes a curve in departing from the line of Notre Dame Street, and turns in the direction of the St. James street at right angles from Notre Dame Street, but that said rails, as well as that part of the roadway which the appellants were bound to maintain, were lawful and sufficient;

"And considering that it was not by any fault, omission or neglect on the part of the appellants, that on the said 25th of June, 1881, the respondent was thrown out of the waggon in which he was being driven while crossing the track of the said railway at the said curve, whereby he sustained the injuries for which he seeks to recover damages in this cause;

"And considering that the driver of the said waggon, while so crossing the said track at the time and place aforesaid, failed to exercise the necessary caution and prudence, to which he was bound on the occasion in question, and might by the exercise of reasonable caution and prudence have avoided the accident by which the respondent was so injured;

"Considering that there is error in the judgment rendered in this cause by the Superior Court at Montreal on the 28th June, 1882, the Court, etc., doth reverse, etc., the said judgment, and proceeding to render the judgment which ought to have been rendered, doth dismiss the action of the respondent with costs," etc.

Judgment reversed.*

Abbott, Tait & Abbotts for appellants.

Lacoste, Q.C., counsel.

Lancetot for the respondent.

DeLorimier, Q.C., and *Geoffrion*, counsel.

SUPERIOR COURT.

MONTREAL, May 31, 1884.

Before TORRANCE, J.

SURPRENANT V. GOREILLE.

Libel—Privileged Communication.

A report made by a foreman in the course of his duty, and without malice, respecting men in his gang, which caused the men to be discharged, is a privileged communication.

This was an action of damages by a man dismissed from the service of the Canadian Pacific Railway Company, on the report of the foreman over him. The plaintiff complained that the report was false and malicious.

The report bore date the 2nd August, 1883, in these words: "I have four men in my gang that I do not want any longer; if you want them anywhere please let me know and I will send them to you—or give me permission to discharge them. They are: F. Suprenant, one of the regular section men: him it is for trying to make trouble with the men while on duty, and the others E. Darbin, L. Darbin, and F. Gravel, for backing him up." In consequence of this report, the plaintiff was discharged.

PER CURIAM. The facts show that the defendant made his report in the course of his duty, and without malice; and, moreover, with reason. The report was a privileged communication. *Lawless v. Anglo-Egyptian Cotton Co.*; A.D. 1869, 4 L. R. Queen's Bench, 262; *Deve v. Waterbury*, 6 Supreme Court R. 143, A.D. 1881.

Plea maintained and action dismissed.

H. Lancetot for plaintiff.

H. Abbott for defendant.

PRIVY COUNCIL.

LONDON, April 7, 1884.

Before LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT COLLIER, SIR RICHARD COUCH, SIR ARTHUR HOBBHOUSE.

CALDWELL, appellant, and McLAREN, respondent.

Stream floatable in part—C. S. U. C., cap. 48—Right of using improvements.

The intention of the legislature in enacting C. S. U. C., cap. 48, sec. 15, (12 Vict. cap. 87, sec. 5), was to give to owners of higher

* In the case of the same Company, appellant, and The Montreal Brewing Company, respondent (an action for damages to the vehicle), a similar judgment was rendered.

lands the right of floating timber down all streams which were naturally floatable for some portions of their course, though at certain points obstructions existed which were only overcome by improvements effected by the owner of the land on either side at his own cost.

Judgment of Supreme Court of Canada (5 L. N. 393) reversed.

PER CURIAM. In this case the now respondent as plaintiff, filed in the Court of Chancery, Ontario, on the 4th May, 1880, a bill of complaint, and appellants, as defendants, filed an answer on the 11th August, 1880. Issues of fact were raised, and evidence was heard at great length before Vice-Chancellor Proudfoot, who, on the 16th December, 1880, pronounced this judgment:

"1. This Court doth declare that those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, described in the said bill, when in a state of nature were not navigable or floatable for saw-logs and other timber rafts and crafts down the same, and doth order and decree the same accordingly;

"2. And this Court doth further declare that the plaintiff is entitled to the user of those portions of the said streams where they pass and flow through the lands of the plaintiff in the said bill of complaint described, and to the improvements thereon, freed from the interruption, molestation, or interference of the defendants or either of them, or their or either of their servants, workmen, or agents, and doth further declare that the defendants have no right to the user of such parts of the said streams for the purpose of driving timber and saw-logs, and doth order and decree the same accordingly.

"3. And this Court doth further order and decree that a writ of injunction be awarded to the plaintiff, perpetually restraining the defendants, their servants, workmen and agents from interfering with the plaintiff's user of the said streams where they pass through the lands of the plaintiff, described in the said bill, and of the improvements erected on the said streams, and restraining the defendants from using such parts of the said streams and the said improvements for

the purpose of driving their timber and saw-logs."

This decree was brought by appeal before the Court of Appeal of Ontario, and, on the 8th July, 1881,—

"It was ordered and adjudged by the said Court that the said appeal should be, and the same was allowed without costs; and that the bill of complaint of the said Peter McLaren, in the Court below, be, and the same is hereby dismissed without costs except in so far as the costs of the appellants (the defendants in the Court below) have been increased by reason of the motion for an interlocutory injunction, and except their costs of appeal to this Court from the order granting such interlocutory injunction, and as to such excess and costs of appeal, the same are to be paid by the respondent to the appellants forthwith, after taxation thereof."

This order was brought by appeal before the Supreme Court of Canada, and, on the 28th November, 1882, it was ordered by that Court,—

"That the said appeal should be, and the same was allowed, that the said order of the Court of Appeal for Ontario should be and the same was reversed, and that the decree of the Court of Chancery of Ontario, dated the 16th day of December, 1880, should be and the same was affirmed.

"And this Court did further order and adjudge that the said respondents should pay to the said appellant the costs incurred by the said appellant, as well in the said Court of Appeal for Ontario as in this Court."

It is from this last order that the present appeal is brought.

There are some things not now in controversy, which it is better to state before examining the allegations in the bill and answer.

The waters which drain from a considerable tract in Upper Canada collect so as to form a river called the Mississippi, which flows down to and into the River Ottawa. There is no controversy as to the Mississippi below a point in the township of Dalhousie called High Falls.

The lie of the country above that point is shown by a map (Exhibit G) prepared by the plaintiff below (now respondent), and

adopted and used on the argument here by the appellants (defendants below).

The waters which flow over High Falls have their origin in a district of considerable dimensions, now divided into several townships. The upper part of this district does not appear to be very steep, though on some of the creeks in it there appear to be rapids. The creeks, at places widening into lakes, finally converge into Cross Lake, in the township of Palmerston. Thence the waters flow in what must be a considerable body of water down a steep and rocky country; and this continues to be the character of the country for some miles. The body of water flowing down this passes over a succession of rapids and waterfalls. The waterfall which is lowest down is High Falls; below that there is no controversy that the Mississippi is floatable.

All this country was till within the last forty or fifty years in a state of nature, and belonged to the Crown. It was covered with timber, and the waters flowed as the force of gravity directed them.

And now it is convenient to examine the allegations in the bill and answer.

The bill of complaint of the plaintiff was filed on the 4th May, 1880, in the Court of Chancery, Ontario. It states that the plaintiff is a timber dealer, having his principal saw-mill at Carleton Place, a village on the Mississippi, a considerable distance down below High Falls. The defendants also are timber dealers, having their principal saw-mill also at Carleton Place.

Both the plaintiff and the defendant have taken from the Crown growing timber on the lands which form the upper townships, the waters from which flow over High Falls.

The bill states that the plaintiff is owner in fee simple of several lots of land. He derives his title from grants by the Crown, some to himself and some to persons from whom he claims by mesne conveyances.

The dates of those grants are all given in the bill; the earliest grant in point of date is one of the 3rd of August, 1853, to one Skead, of lands at High Falls, and the latest in date is one of 18th September, 1879, to the plaintiff himself, of lands on one of the creeks above Cross Lake. It is not unimportant to remark

that all the grants under which the plaintiff claims are subsequent in date to the Act of 1849.

The bill then contains these statements:—

"8. The plaintiff is also the owner of large tracts of timber land in the aforesaid townships and along the banks and in the vicinity of the said streams, and he has for many years past been using, and is now using, and expects for many years to come and until the timber on the said land so owned by the plaintiff has become exhausted, to continue to use the said streams for the purpose of driving or floating down his timber and logs to his mill at Carleton Place aforesaid."

"9. The said streams were not navigable streams nor floatable for logs and timber during the time the said lands were vested in the Crown, not until after the time when the improvements hereinafter referred to were made on the said streams, and when they were in their natural and unimproved state the said streams would not, even during the freshets, permit of saw logs or timber being floated down the same, but on the contrary, were quite useless for that purpose.

"The plaintiff is entitled, both as riparian proprietor and as owner in fee simple of the bed of the said streams, where they pass and flow through the said lots, respectively, to the absolute, exclusive, and uninterrupted user of the said streams for all purposes not forbidden by law, and amongst other purposes to the absolute and exclusive right to the user of the same for the purpose of floating or driving saw logs and timber down the same.

"11. The plaintiff has for many years been engaged in the business of lumbering in the said county of Lanark, and at other places throughout this Province, and more particularly in the timber region along the banks and in the vicinity of the said streams; and in order to get to his mill at Carleton Place aforesaid, and to market the timber and saw logs cut in that region, the plaintiff and various other persons and firms, the whole of whose rights and interests therein and thereto have been acquired by purchase by the plaintiff, have expended a large amount of money, to wit, not less than one hundred and fifty thousand dollars, not only where the said streams run and flow through the lots

above described, but at various other parts thereof, over a length of about fifteen miles on the said 'Buckshot Creek,' and a length of about fifty miles on the said 'Louse Creek,' and main branch of the 'Mississippi,' in improving the said streams, by deepening the same by clearing out therefrom stumps, trees, and *débris* of all kinds, by erecting dams, slides, and other erections and improvements wherever necessary on the said streams, and occasioned by the existence of rapids, falls, and shallows in the course thereof; and by reason of such expenditure the said streams have become navigable for saw logs and timber which, with the aid of such dams, slides, and other erections, may now be floated down the said streams during the time of freshets, which occur chiefly in the spring of the year.

"12. On the various parts of the said streams which run and flow through the said lands hereinbefore described, the plaintiff and those through whom he claims the said lands have expended a large amount of money in making certain specific and very valuable improvements, that is to say:—"

(The description of the improvement at High Falls may serve as a sample):—

"On the said parcel of land, being the front half of lot number fourteen in the first concession of the township of Sherbrooke North, the plaintiff, and those through whom he claims the said parcel of land at a place called 'High Falls,' a portion of the said Mississippi River, which runs through the said lot, having erected a dam across the said Mississippi, where there is a fall of about seventy feet from an island in the centre of the said stream to the south shore thereof, and also a dam between the said island and the north shore thereof, and the said plaintiff or those through whom he claims, that is to say, the said Skead and Gilmour, or one of them, has formed an artificial stream, consisting of a cutting through rock and earth, and a slide connecting the lake or pond above the said High Falls, on an extension of the said Mississippi River, with the lake or pond below the said falls, which said cutting also passes through the afore-mentioned lot in the township of Dalhousie, the effect of the building of the said dams at the entrance

of the 'High Falls' being to raise the level of the waters in the said pond or lake above the same, and to form a stream in the said cutting or artificial stream as aforesaid made through the said lot fourteen and the said lot in Dalhousie, and thus rendering the same capable of floating saw logs and timber down the same.

"31. The defendants being engaged in their business as hereinbefore alleged, have recently got out of the woods in the said township of Abinger a large quantity of saw logs, to wit, about 9,000 saw logs, the whole of which is now lying in or being driven by the defendants down the said Buckshot Creek, and they commenced to enter the said improvements on Buckshot Creek on the twenty-seventh day of April, one thousand eight hundred and eighty, and they have taken them over the improvements hereinbefore particularly referred to, and made as aforesaid on lot one in the third concession of Abinger aforesaid, and they are now driving them down the said Buckshot Creek with the intention of taking, and they threaten and intend to take them over the other hereinbefore described improvements made as aforesaid on the said Buckshot Creek, and down through the main branch of the said Mississippi, and will do so unless restrained by the order and injunction of this Honourable Court.

"32. The defendants are also taking a quantity of saw logs, about ten thousand in number, down the said Louse Creek, and through the said lands belonging to the plaintiff in the township of Denbigh, and thence down the said stream, and to do this the defendants threaten and intend to avail themselves, and unless restrained by this Honourable Court they will avail themselves, of the said improvements made by the plaintiff and those under whom he claims, and, in so floating and running the said timber and saw logs down the three said streams, the defendants are interfering with and obstructing the plaintiff and his employees in floating and running down the plaintiff's timber and saw logs, to the great damage and injury of the plaintiff, and to the damage and injury of the said improvements.

"33. The defendants, in so floating and

running their timber and saw logs down the said streams, are wrongfully and forcibly, and without right or colour of right making use of the improvements made by the plaintiff and those under whom he claims, and to which, for the reason aforesaid, the plaintiff is entitled to the exclusive and uninterrupted user.

"37. The plaintiff further shows that the defendants have made use of the said streams and the improvements thereon without any authority or license from the plaintiff, and well knowing, as the facts are, that the plaintiff was owner of such improvements, and that owing to the said improvements, all of which have been made by the said plaintiff or those through whom he claims, the said streams have become useful for the purpose of floating down saw logs and timber, and that before the said improvements were made, and when the streams were in a state of nature, they would not permit of timber and saw logs being floated down the same even during freshets, yet the defendants have never paid to the plaintiff any compensation for the user of the said streams and improvements, and the plaintiff submits that the defendants are liable to pay him compensation therefor, and that this Honourable Court should direct an account to be taken of the amount of compensation which the defendants should pay, and that the defendants should be ordered to pay the same to plaintiff when so ascertained."

The following are the more material parts of defendants' answer:—

"We are the owners of certain timber limits situated in the townships of Abinger and Denbigh, in the county of Addington, for the purchase of which we paid a very large sum of money.

"The said limits were originally the property of the Crown, and were sold by the Crown Lands Department to one Skead, and we claim title thereto through the said purchaser from the Department.

"Our object in purchasing the said limits was to obtain a supply of timber and saw logs for our mills at Carleton Place, and we would not have purchased and paid the price we did for them for any other purpose or object.

"Timber and saw-logs, cut and manufactured upon the said limits, can only be brought to our saw-mills by means of the Mississippi River, and Buckshot and Louse Creeks, mentioned in the Plaintiff's bill, form the only outlets by which the said timber and saw logs from our said limits can be carried to the said Mississippi River.

"We deny the allegations contained in the 9th and 10th paragraphs of the said bill, and, on the contrary, we say that we are informed and believe, and charge the fact to be, that the said Mississippi River and Buckshot and Louse Creeks are all streams which are navigable or floatable for timber and saw logs within the meaning of the statutes in that behalf, and we claim the benefit of the said statutes.

"We deny that the alleged improvements upon the same streams, claimed by the plaintiff, confer upon him the rights he claims against us by his said bill, but we have nevertheless been always ready and willing, and before the commencement of the suit we offered the plaintiff, to pay him any proper sum for the use of any of said improvements, or any loss or damage that he might fairly claim to be put to by reason of the passage of our said timber and logs over the said improvements, and we offered to submit the question of the amount we should pay to arbitration, but the plaintiff would not accede to any of our offers."

Strong, J., began his judgment by saying:

"The finding of the learned Judge before whom this case was tried, that those parts of the river Mississippi and of Louse and Buckshot Creeks, at which the Appellant has constructed his improvements, were not originally and in their natural state capable of being used, even in times of freshets, for the transportation of saw logs or timber, was not on the argument of this appeal demonstrated to be erroneous, and a careful perusal of the evidence has led me to the conclusion that an attempt to impugn that finding would have been hopeless, even if we could have entirely disregarded the rule so often laid down in this Court, that the finding of the Judge before whom the witnesses were examined is, in the case of contradictory evidence, entitled to the strongest possible

presumption in its favour. We must, therefore, assume the facts to be as they are stated in the first declaration with which the decree under appeal is prefaced, namely,—

"That those portions of the three streams referred to in the Plaintiff's bill of complaint, where they pass through the lands of the Plaintiff, when in a state of nature were not navigable or floatable for saw logs and other timber, rafts and crafts down the same.

"The Appellant's title to the lands upon which he has made the improvements in question, including the beds of the respective streams, was not seriously disputed, and has been established by the production of his title deeds. The question for this Court to determine is, therefore, purely one of law."

To this their Lordships agree. The Respondent cannot now contend that timber could not be practically floated down those portions of the streams whilst in a state of nature, though not so well or so profitably as after the improvements were made; but the Vice-Chancellor cannot be understood to find that it was impossible to float any timber at all, over High Falls for instance. In an affidavit used by the Plaintiff for the purpose of obtaining an interim injunction, Mr. T. Skead says:—

"I purchased High Falls, in the thirteenth paragraph in the bill referred to, from the Plaintiff's father, and built the dam and slides there; and about the year of our Lord 1849, I took John Allan Snow, a surveyor, with me and surveyed the whole line of the river from High Falls to Cross Lake, and he and I then drew a plan of the improvements which we thought necessary to make the river navigable and floatable for timber and saw logs, which said improvement was substantially carried out by Messrs. Gilmour & Co., who purchased from me the lands and limits bordering on this portion of the said Mississippi.

"Before the improvements at High Falls, a Mr. Playfair, during the highest freshets, used to run a few hundred logs over the falls, but they were so injured and damaged in their transit thereover, that he told me he would have to give it up. I had not made the slide hereinbefore referred to."

The finding of the Vice-Chancellor must be

understood as meaning only that in a commercial sense it could not be done; the timber being so difficult to guide over the falls and so liable to be injured that no one can profitably do it, and consequently no one would do it. And it must be taken, as admitted, that at many places above High Falls and for considerable distances, timber could be floated along the streams. Obviously this must have been the case wherever the streams expanded into lakes.

[Concluded in our next issue.]

GENERAL NOTES.

A parochial clergyman writes to the *Times* on the "Working Classes and Divorcees." He says that the cheapest divorce case costs £30 to £40, and urges that the cost should be reduced, so that respectable working-men may enjoy the luxury of a divorce.

The *Solicitors' Journal* says that Benjamin's great characteristic as an advocate "was his uncommon combination of legal knowledge and accuracy with adroit and persuasive rhetoric." Another of his characteristics was his manner of his charging fees. At first, he said, "I charge a retainer, then a reminder, then a refresher, and, lastly, a finisher."

The late Mr. R. A. R. Hubert, prothonotary of the Superior Court, Montreal, died very suddenly early in the morning of the 17th June. The deceased was at the office as usual until after 5 p.m. on the 16th, and retired about midnight, but soon after was taken ill, and died within an hour. Mr. Hubert was born in 1811, and practised as an advocate for many years. He succeeded the late Mr. Coffin as prothonotary in 1867. He was a courteous gentleman, and enjoyed universal respect during his career at the bar and as an official of the Superior Court.

He was a young lawyer and was delivering his maiden speech. Like most young lawyers, he was florid, rhetorical, scattering and windy. For four weary hours he talked at the court and the jury, until everybody felt like lynching him. When he got through, his opponent, a grizzled old professional, arose, looked sweetly at the judge, and said: "Your Honor, I will follow the example of my young friend who has just finished, and submit the case without argument." Then he sat down and the silence was large and oppressive.—*Central Law Journal*.

A Hereford solicitor was charged at the City Police Court with stealing an orange, value one penny, from the basket of a hawker, who was supposed to be blind. The fact was admitted by the defendant, who, however, explained that he was a customer of the prosecutor's, and disbelieving in his supposed blindness, he took the orange out of the man's basket to test him, as he went about the city with a seemingly perfect knowledge of what he was doing. He intended returning the orange, but the man had disappeared. The magistrates accepted the explanation, and the defendant was discharged, but compensated the prosecutor by giving him half-a-crown.—*Law Journal* (London).

The Legal News.

VOL. VII. JUNE 28, 1884. No. 26.

THE LICENSE QUESTION—THE TEST CASE.

Written constitutions would be very admirable things if they rendered it impossible for anybody to infringe the rights they ostensibly guarantee. Unfortunately, experience teaches us that they are as subject to violation as unwritten constitutions, and the very attempt to commit constitutional rules to writing, from abstract considerations of what it is desirable to establish, gives rise for the most part to a new peril. The chief dangers to which all constitutions are exposed, however, arise from the calculated attacks of one or other power in the state with a view to undermine all other powers, and of this we have numerous examples, both on the part of the Dominion and of the local governments. On the one hand we have the local authority claiming equality with that of the Dominion, and denying its supremacy, and one local official has even had the hardihood loudly to proclaim the proposition that all powers not specially conferred on the Dominion by the B. N. A. Act belong to the Provinces. On the other hand the Dominion Parliament hardly hesitates to legislate on any subject, and by enlarging the application of laws has, not altogether unsuccessfully, robbed the local legislatures of powers evidently intended to be conferred on them.

We are not disposed to whine over these contests, which seem to be the accompaniment of every institution no matter how dexterously framed, but the license question is now being put into a shape which presents a new and very formidable menace to provincial powers. We learn from a special to the *Montreal Gazette*, dated Ottawa, 15th June, that "The reference to the Supreme Court of the Dominion Liquor License Act is made under authority of the 26th section of 47 Vict., chap. 32, passed last session, which provides that, whereas doubts have been raised as to the constitutionality of the

the license act, it may be referred to the Supreme Court, before which the provinces may be represented by counsel, the decision of the Supreme Court to be final, unless leave be granted to appeal to the Privy Council." The finality thus to be established is intended to decide the following important questions, which, we learn from the same authority, form part of the case:

"1. Question—Are the following Acts in whole or in part within the legislative authority of the Parliament of Canada, namely: 1. The Liquor License Act, 1883; 2. An Act to amend the Liquor License Act, 1883?

"2. Question—If the court is of opinion that a part or parts only of the said Acts, are within the legislative authority of the parliament of Canada, what part or parts of said Acts are so within such legislative authority?"

One can scarcely help asking by what authority the Dominion Parliament passed such an Act? A very able supporter of the government, who does not generally speak at random, addressing his constituents, recently, put forward what, we may presume, is the best justification of the Act. He said: "This, therefore, is not an attack on the rights of anybody—it is simply an attempt to procure a complete legal decision from the highest courts, of the powers of the Dominion and provincial authorities on a subject upon which grave doubts existed, and relative to which it was most important to have these doubts set at rest."

It is always important to set doubts at rest; but, however desirable this may be, the object will scarcely be attained by appealing to an imaginary authority. It is nothing to say that "the provincial authorities have concurred." Their concurrence or disapprobation can neither add to nor diminish the powers of parliament. It is a considerable tax on credulity to require us to believe that this is a *bona fide* attempt to have a complete decision of a vexed question. The wicked promptings of the mind lead one rather to suppose that it is an attempt to snatch an advantage. Else, why should the suit not have been allowed to run a regular course? The decisions of higher courts are only better than those of inferior courts in

this—that they are rendered on re-hearings. If the former are turned into courts of first instance they lose this advantage. Again, why make the decision of the Supreme Court final? If the decision of the highest courts is really desired, it seems strange to restrain the appeal to the Privy Council.

We venture to affirm further, that the Dominion legislature has no authority to pass such an Act. Its exceptional power to create courts is contained in sec. 101 B. N. A. Act, 1867. That section allows Parliament (1) to create a Court of Appeal for Canada; (2) to establish additional courts for the better administration of the laws of Canada. The Act in question neither creates a Court of Appeal nor an *additional* court, for the administration of the laws of Canada. The Supreme Court is called upon to act as a court of first instance, and to decide on an Imperial Act which is not exclusively a law of Canada.

We should be glad to know what is meant by the concluding words, "unless leave be granted to appeal to the Privy Council." By whom is leave to be granted in the test suit? Is it supposed that if the Supreme Court decides that the License Act of 1883 and its amending act are within the authority of Parliament, the first liquor seller prosecuted will be precluded from pleading that the law is null? If so, we are to have *arrêts portant réglemeut*—an anomaly in the British system.

R.

THE BOUNDARY QUESTION.

While our local legislators have been amusing themselves and the public with resolutions and counter resolutions autonomous, which really signify nothing, important questions of federal politics have been progressing unheeded. All this may be for the best. It may be as effectual to steal an advantage as to cut the Gordian knot, but such deft operations look better at a distance than when performed under our noses.

From the personal and fashionable intelligence of Toronto dailies we learned, some little time ago, that Mr. Attorney-General Mowat had taken his departure for London, there to prepare for his expected triumph on the Boundary Question. It will be remembered that in the speech of the Lieutenant-

Governor of Ontario at the opening of last session, we were told how glad Mr. Mowat was to have it in his power to state, that a case had been agreed for a reference; of the dispute respecting the intercolonial boundary between Manitoba and Ontario, to the judicial committee of Her Majesty's Privy Council. "The first question to be decided under that reference is the validity of the award made by the arbitrators in 1878," &c.

As the pre-eminence given to this branch of the case has been thought deserving of such exceptional notice, it is not unfair to suppose that it is considered as a diplomatic victory of some moment, and perhaps the cause of Mr. Mowat's well-known dislike to a reference to the Privy Council being changed to gladness. It may be a crumb of comfort, for on the real question as to the boundaries of Ontario there is no sort of difficulty.* Probably Mr. Mowat over-rates the result of his diplomacy. Much reliance need not be placed on the unwillingness of the Privy Council to disturb an award concurred in by an English Ambassador. Nor can one of Mr. Mowat's legal experience hope that the judicial committee will seek to escape from the examination of the ponderous historico-legal argument on the merits by deciding so slim a *question préjudicielle* as the validity of the so-called award.

Equitably the award has no claim to be favourably considered. It is notorious that the Dominion Government sold the battle. The real question, then, was between Ontario and Quebec, and yet the Chief Justice of Ontario and a former representative of Upper Canada and of Ontario, with the Ambassador thrown in to give some show of fairness to the preconceived decree, were selected to decide the matter.† There was no attempt

* The only other view than that of the height of land and the due north line from the junction of the Ohio and Mississippi Rivers, that can be sustained with any show of reason, is that put forward by Mr. Justice Armour. I understand from the answers of the learned judge that he maintains the height of land to be the whole boundary to the north and west of Ontario as being the territory always occupied by the former provinces of Upper Canada. There is much that is equitable in this view; but the learned judge hastens to observe that the decision in the *Reinhardt* case is an authoritative protest.

† See with what care the Imperial Parliament deemed it necessary to provide for impartiality in the selection of arbitrators. Section 142 B. N. A. Act of 1867.

to lay down a legal boundary, and the Commissioners did not think it worth while to conceal their disregard for the arguments of counsel.

Fortunately for the predominance of truth, Mr. Mowat's hobby is as unfounded in law as it is unsupported by equity. The Dominion Government had no more power to extend the boundaries of Ontario by an award than to extend them arbitrarily by a donation. A valid submission to an award implies the power to transact, i.e., the power to compromise. It will scarcely be contended that the Dominion Government could, by a compact with the Government of Ontario, have altered the boundaries of the Province. This is elementary.

It would lead to greater length than our space can spare room for, to develop this proposition fully. It is sufficient to refer to section 3, "Declaration of Union," section 5, "Four Provinces"; section 6, "Provinces of Ontario and Quebec," to establish that under the Act of 1867, the provinces forming the union were determinate bodies, legally circumscribed, and that no power but the Imperial Parliament could alter them. Their limits were to be decided as all legal questions by the courts. This has been admitted, for by the Act of 1871, special power was given to increase, diminish or otherwise alter the limits of any province. (Section 3). Nay more, it was questioned whether the Dominion Parliament had power to create a new province out of territories forming part of the Dominion, but not included in any province (section 2); and section 5 of the same Act confirms the Acts of Parliament establishing a temporary government for Rupert's Land and the North-west Territories and for the "government of the province of Manitoba."

It seems clear, then, that without the powers conferred by the provisions of the Imperial Act of 1871, no power existed in the Dominion Parliament to alter the limits of a province. In the submission to the arbitrators, did the governments of Canada and of Ontario pursue the powers so conferred? Clearly not. It is the Parliament of Canada which may, with the consent of the legislature of any province, alter the limits of such province, not the governments.

The object of the foregoing remarks is only to resume the questions raised, and to draw the attention of the Government of Quebec to the right and duty of that province to be represented before the Privy Council. From the isolated position of the majority of the population of Lower Canada, it became necessary, at the time of confederation, to provide special protection for their rights. To secure this protection to some extent, it was determined to make Quebec the unit, to some extent, of confederation. Population was to decide the number of representatives each province might send to Parliament, provided Quebec should never have fewer than sixty-five (Sections 51 and 52). Then, as to senators, there were three groups—Ontario, Quebec and the Maritime Provinces. Therefore it is, I have said, the real interest as to the award was between Ontario and Quebec. It was manifestly the interest of Quebec to prevent the neighbouring province of Ontario becoming by increase of territory an "Empire" province, and so disturbing the equilibrium of confederation. R.

NOTES OF CASES.

PRIVY COUNCIL.

LONDON, April 7, 1884.

Before LORD BLACKBURN, SIR BARNES PRACOCKE,
SIR ROBERT COLLIER, SIR RICHARD COUCH,
SIR ARTHUR HOBHOUSE.

CALDWELL, Appellant, and McLAREN, Respondent.

[Concluded from p. 200.]

So understanding the finding, the question, which though raised as to many places may most conveniently be dealt with as if it related to one only, seems to be this.

The waters have formed a stream or river, which for many miles is capable of floating logs and timber, at least during freshets, down towards a market, but at a part of it where the soil on both sides of the stream belongs to the plaintiff, there is a natural obstacle such as a rapid and waterfall which renders it impracticable in any commercial sense to float timber down the stream at that part.

The plaintiff, or those through whom he claims, have made improvements, consisting

substantially of dams above the waterfall to keep the water back, so as to make the rapid deeper and slower, and made slides over the top of the dam and down to below the falls, so that timber can by means of these slides be carried safely over the waterfall. The defendant proposes to bring the timber from the part of the stream above the obstacle by means of these improvements. He does not claim to do this by any common law right, but by virtue of certain statutes of Upper Canada. And it cannot be disputed that the Legislature had full power to confer such a right; whether they have done so or not must depend on the construction of the statutes.

The defendant has always been ready and willing to pay for the use of the improvements; that is obviously fair and just, but it is not pretended that the statutes provide in terms that if he uses such improvements he shall pay for them. Had either of them done so, the intention of the Legislature to authorize him to pass over the obstacle by means of the improvement would have been quite clear. The absence of any such provision is strongly relied on as showing that the Legislature did not so intend.

The plaintiff relies on his common law right, as owner of the soil, to prevent any one from using his soil in any way which he does not choose to allow, unless, by statute, that right is abridged, as it may be.

There has been a considerable diversity of opinion amongst the Judges in the Courts below. Their Lordships have pursued their opinions with much advantage, and have with great care considered the reasons of those from whom they differ. In the result they come to the conclusion that the judgment of the Court of Appeal for Ontario is right and should be restored.

They think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is *prima facie* at least, owner of the soil which forms the bed of the stream, and as owner of this land covered by water, has all the rights of a landowner. But this is subject to all rights of the owners above him to have the water flow away from their land, and to all rights of the owners below

him to have the flow come down to them as it was wont. It is also subject to any rights which the public have over it.

One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to do so, or indeed for any other lawful purpose, to erect a dam on it. The public may have rights to navigate the stream, and whenever such a right exists the right of the mill-owner and the right of the public come into conflict. They may co-exist, but when they do, one or other must be modified.

The rights of the public to navigate a stream may be created either by prescription or by dedication by the owner of the land within time of legal memory. And in an old settled country like England it could seldom be material to enquire further than as to those modes of creating such a right. But when the law of England was taken out to a new, unsettled country where prescription could not exist, and dedication could rarely exist till after the country was to some extent settled, it became important to enquire whether the principles of the common law did not give such a right independent of any user, wherever the stream was, in its nature, capable of being navigated. No question arises in the present case as to this right of navigation; and, at all events, up to a period later than 1849, it was a question of great doubt what the law of Upper Canada was on this subject. The right now claimed to use streams, not navigable for general purposes, to float down timber, was one, which in England, if it existed at all, from the nature of the country, could not be important; it never came into question in any case of which we are aware. It was one which, in a new wild country overgrown with timber, might be very important, and it must be a question of doubt what was the right.

The owner of the land covered with water, over which a stream flows, has the unquestioned right to erect a mill on it, if he does not thereby infringe on any right of the proprietors above or below him, or on the public rights. The doubts as to what was the extent of the public right over such streams cast a doubt on the extent to which it was lawful to erect mill dams.

It is obvious that it was very desirable that, for the purpose of encouraging the development of the country, these doubts should, as soon as possible, be solved. And as the Legislature of Upper Canada had full power to enact what should be the law in that country, the real question is, what did they enact?

The statutes of Upper Canada have been consolidated and afterwards revised; but the Acts under which this is done are merely consolidation and revision Acts, and do not alter the effect of those statutes which bear on this question. The first statute which it is necessary to notice is the Act of 25th March, 1828.

After a preamble that it is found expedient and necessary to afford facility to the inhabitants of the Province engaged in the timber trade in conveying their rafts to market (as well as to the ascent of fish) in various streams now obstructed by mill dams, it enacts that every occupier of "any mill dam, which is or may be legally erected," where timber "is usually brought down the stream on which such dam is erected," shall, under a penalty, "construct and erect a good and sufficient apron to his dam." The 2nd section describes the kind of apron:—"Such apron shall not be less than eighteen feet wide, by an inclined plane of twenty-four feet eight inches to a perpendicular of six feet, and so in proportion to the height. Where the width of the stream will admit of it, where such stream or dam is less than fifteen feet wide, the whole dam shall be aproned in like manner, with the same inclined plane."

Without encumbering the case by considering any question relating to the fish, the intention of the Legislature seems obvious. They contemplated that there might be mill dams then or thereafter legally erected on streams down which lumber was usually brought. And without inquiring what were the conditions necessary to make such an erection legal, the Legislature, for the purpose of affording facility to those engaged in the lumber trade in conveying their rafts to market, impose a duty on the mill-owner to add to his mill an apron so as to let the rafts pass over it. This did to some extent impose

on the owner of the dam, by supposition legally erected, the burthen, without any compensation, of building an apron; but it is clear that the Legislature did intend for the good of trade to impose that burthen on them. Probably it was not supposed to be very heavy. The Act, however, is in terms confined to those streams down which lumber was "usually" brought.

Several statutes were referred to on the arguments, which their Lordships think do not much affect the question.

Then comes the Act of 30th May, 1849.

The preamble is, "Whereas it is necessary to declare that aprons to mill-dams which are now required by law to be built and maintained by the owners and occupiers thereof in Upper Canada" (obviously referring to the Act of 1828 already cited), "should be so constructed as to allow a sufficient draft of water to pass over such aprons as shall be adequate in the ordinary flow of the stream to permit saw logs and other timber to pass over the same without obstruction." This clearly indicates an intention to throw upon those who have dams "legally erected" upon streams a further burthen. The first section with the object contemplated by the preamble cast upon them without any compensation the duty to erect and maintain waste gates, brackets, and slush boards, so as to keep the depth sufficient to allow the passage of "such saw-logs, lumber, and timber as are usually floated down such streams," with a proviso that "no person shall be required to build aprons or slides on small streams unless required for the purposes of floating down lumber."

The fifth section of this Act goes beyond the object mentioned in the preamble; it is, however, perfectly settled that though the preamble aids in the construction of an Act, effect is to be given to the intention of the Legislature if it sufficiently appears though it goes beyond the object of the preamble.

It is upon the construction of this fifth section that their Lordships think this case depends. In the Consolidated Statutes for Upper Canada, cap. 48, it is divided into two sections—sections 15 and 16—and the meaning is made rather clearer by transposing the position of the two provisos at the end of the

section which are made into section 16, but there is no alteration in the substance.

The fifth section is in the following terms :—

"That it shall be lawful for all persons to float saw logs and other timber rafts and crafts down all streams in Upper Canada during the spring, summer and autumn freshets, and that no person shall by felling trees or placing any other obstruction in or across such stream, prevent the passage thereof; provided always, that no person using such stream in manner and for the purposes aforesaid shall alter, injure, or destroy any dam or other useful erection in or upon the bed of or across any such stream, or do any unnecessary damage thereto or on the banks of said stream, provided there shall be a convenient apron, slides, gate, lock, or opening in any such dam or other structure made for the passage of all saw logs and other timber, rafts, and crafts authorized to be floated down such stream as aforesaid."

This enactment, it is to be observed, became law in 1849, and has not been altered since. In 1863, the case of *Boale v. Dickson* was decided in the Court of Common Pleas of Upper Canada. The question there was as to a claim for the use and occupation of a slide on the Indian River. The Court of Common Pleas thought that if the slide was on a stream within the meaning of the enactment their Lordships are now considering, the plaintiff must fail; whether, if the statute applies, this consequence would follow, their Lordships need not stop to inquire. So thinking the Court of Common Pleas put a construction on the Act.

The Vice-Chancellor, in the present case, after the evidence was heard, said, addressing the defendant's counsel :—

"I think, Mr. Bethune, you stated that if I considered myself bound by the authority of *Boale v. Dickson*, there was little use in arguing the case. It seems to me that I am bound by that case in this respect, that I ought to be bound by and respect the ruling of a Court of co-ordinate jurisdiction, though not in the same sense as I would be bound to follow a judgment of the Court of Appeal. If the interpretation placed upon it in *Boale v. Dickson* be the construction this statute is to bear in regard to improvements upon rivers and

their floatability, I understand that case to determine that if any improvements are necessary to render streams floatable, the statute does not apply, that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. It therefore comes to be a question of evidence as to whether the streams mentioned here can be considered floatable without artificial aids."

The Judges of the Court of Appeal for Ontario, all agreed that Vice-Chancellor Proudfoot had correctly apprehended the construction put upon the statute by the Court in *Boale v. Dickson*, and that he could not properly disregard the decision of a Court of co-ordinate jurisdiction, but all four thought that construction wrong; Burton J., though dissenting from his brothers, expressly saying :—

"I quite agree with them in their view of the doctrine laid down in *Boale v. Dickson*, and think there is nothing to warrant the qualified construction placed upon Sect. 15 of the 12th Vict., c. 87, by the learned judge who delivered the judgment in that case; but I am unable to bring myself to the conclusion that the mere permission or the recognition of the right to float all streams during freshets makes the entire streams *publici juris*, although, in point of fact, many portions of it may be quite impassable, even in times of freshets, for the smallest description of timber or other article of merchandise.

The Judges in the Supreme Court thought that the construction put upon the statute in *Boale v. Dickson* was right, and the Chief Justice, Sir W. Ritchie thought, that even if wrong, it ought to be maintained on the ground taken by Lord Ellenborough in *Doe and Oiley v. Manning*, 9 East 71, that in questions of conveyancing it was important to adhere to decided cases even if convinced they were originally wrong. This doctrine has often been recognized. The maxim "*Communis error facit jus*" is peculiarly applicable to conveyancing questions. But this is not a question of conveyancing, and their Lordships do not think that there is any ground for saying that *Boale v. Dickson*, if wrong, should be followed.

And their Lordships agree with the Judges in the Court of Appeal for Ontario in thinking that there is nothing to justify any Court in construing the words "all streams" as meaning such streams only as are at all places floatable. They do not think that every little rill, not capable of floating even a balrush, is a stream within the meaning of the Act. But when once it is shown that there is a sufficient body of water above and below the spot where the natural impediment renders the stream at that spot practically unfloatable, it does not make it cease to be a part of the stream in the ordinary sense of the words.

It has been argued that though this might have been the natural meaning of the words, if the enactment had been "that it should be lawful to float saw timber rafts and craft down all streams in Upper Canada at all seasons," that the legislature here confined the enactment to making it lawful "during the spring, summer and autumn freshets." And that, it is argued, shows an intention to cut down the large words "all streams." Their Lordships do not assent to this argument. Probably the Legislature confined the enactment to the seasons during which lumberers ordinarily ply their trade, thinking it better to leave the rights of all parties at all other seasons untouched. Whatever was their motive, it seems clear, on the construction of the enactment, that if a lumberer claims a right at any other period than during the freshets to float timber along a portion of a stream, he must rest his claim on something else than this enactment. It is not, however, an objection to his right under this enactment to float during freshets, that he may, on the same part of the stream be entitled, on other grounds, to float at all times.

Their Lordships do not think that the limitation of the right in the stream to one period of the year prevents that from being a part of the stream which would otherwise, in the ordinary sense of language, be a part of the stream, even if the existence of an impediment there makes it not practically available for the purposes of the lumberer even in freshets. The respondent's construction of the enactment seems to them to require the introduction by implication of some such words

as these, "except on such parts of the streams as are, owing to the presence of an impediment such as a waterfall, not practically available for the purpose of floating timber, until some improvements are made."

There does not seem to their Lordships to be any sufficient reason for implying this or any similar qualification.

It is quite true that it is not to be presumed that the Legislature interferes with any man's private property without compensation. But if the whole stream is floatable during the freshets it cannot be doubted that the Legislature did mean, with the object of affording facility to lumberers, to carry their timber to market, to say that they should have the right to float down the stream at these seasons without obstruction by the owners of the bed of the river—without paying them anything. If, as seems to be the opinion of Burton, J., the principles of the common law could be worked out so as to give this right, at any rate the Legislature in 1849 did not know this, or mean to declare it. Without declaring what the law then was, they enacted that "from this time, 1849, forward the law shall be as we now enact."

It is, however, quite true that no power is given by the statute to make practically floatable spots which are not so in their natural state, and that the Legislature, who must be taken to know that such streams as this Upper Mississippi were likely to exist in the unimproved parts of the country, must have contemplated that, before the right they gave became practically useful, something must be done which would be a trespass if done without the authority of the owner of the soil.

There does not seem to be any great difficulty in holding that, if all that was done was to remove some existing obstruction, as by blowing up a rock which impeded the passage, and thus putting the bed of the stream into the state in which it would have been if the rock had never existed, a right to float timber down that spot might be exercised, even though the blowing up of the rock could not be justified against the owner of it. There is more difficulty in dealing with the case of a dam maintained by or with the assent of the owner of the soil for the purpose of making the part of the stream practically floatable,

which was not so in its natural state. There is certainly no obligation on the person who makes and maintains such a dam to continue to maintain it; if he ceases to do so, it becomes useless, and can only, if at all, be made useful by forming a joint stock company for the purpose of doing so; and if the Court of Common Pleas in *Boale v. Dickson* were right in thinking that, if the statute applies, a promise to pay slidage for the use and occupation of such works, in consideration that the plaintiff would allow the defendant to use them, should not be enforced, the Legislature have improvidently reduced the inducement to make the stream at such a part practically floatable. But, though this may be so, the question remains whether the words of the Legislature do not express an intention that, when the part of the stream could be used, it should be lawful for all persons to use it.

It does not seem to their Lordships that the private right, which the owner of this spot claims, to monopolize all passage there, is one which the Legislature were likely to regard with favour, and in the earlier legislation they had, without scruple, cast on the owners of "dams legally erected" the obligation, at their own expense, to make such dams passable for lumber; if the law was, (contrary to what is laid down in *Boale v. Dickson*), that reasonable compensation should be payable for the use and occupation of works maintained for the purpose of rendering the portion of the stream practically useful for floating purposes, there would be no hardship at all; if the Legislature had inserted a provision that such should be the law, there could have been no doubt of their intention. They have not inserted such a provision; but, though that makes the case somewhat difficult, their Lordships do not think it enough to justify what seems to them a somewhat violent departure from the plain meaning of the words.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed and that of the Court of Appeal restored. They do not think there is any reason for departing from the general rule that the costs of the appeal

should be borne by the unsuccessful party, the respondent.

Judgment of Supreme Court reversed.

Bethune, Q.C., (of the Ontario Bar), and *Jeune*, for the Appellants.

The Solicitor-General, McCarthy, Q.C., (of the Ontario Bar), and *Crump* for the Respondent.

LEGISLATION AT QUEBEC.

Au Rédacteur du LEGAL NEWS :

Monsieur,—Par la section 1ère du chapitre 26, de la 46ième Victoria, il était statué comme suit: "Tout jour juridique sera réputé jour de terme excepté pour l'instruction des causes inscrites sur le principal, etc."

Dans les districts ruraux où les termes de cour sont nécessairement rares, ce statut a fait un bien immense aux justiciables et à la profession en facilitant l'expédition des causes, chose tant désirée par tout le monde. Nous pouvions tous les jours procéder avec les exceptions préliminaires et défenses en droit, soit sur le mérite ou par motions pour les faire rejeter ou pour amender, de sorte que ces procédés, qui servaient généralement à retarder les causes, en perdant leur utilité étaient en partie disparus de la pratique. On ne cessait de se louer de ce changement. On s'étonnait d'avoir pu endurer si longtemps un système par lequel un débiteur obtenait quelquefois trois ou quatre mois de délai sur production d'une simple exception à la forme.

A notre grande surprise, voilà que pendant les derniers jours de la session on bifte cette importante section et on nous remet sous l'ancien régime. Pourriez-vous, M. le Rédacteur, nous donner la raison de ce changement rétrograde?

P.

Sherbrooke, 22 juin 1884.

GENERAL NOTES.

The case of *Eno* illustrates the defects of our extradition laws. It is quite exasperating to a large part of the community that a criminal, guilty of so heinous an offence as he is accused of, may escape by crossing into Canada, and may live there in open luxury, almost within sight and hearing of those whom he has defrauded, and laugh at the laws. It would be well to have our treaties revised, especially our treaties with next door neighbours, and to have them enlarged so as to comprehend many more offences than are now covered by them. The advance of "civilization" seems to have made possible some new crimes, undreamed of forty years ago, and just as worthy of relegation to the offended community for punishment as those now recognized. Even some old and familiar crimes might well be added to those for which extradition will lie. It is worth while for sovereign nations to refuse to become asylums and Alsatias for each other's criminals.—*Albany Law Journal*.

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A QUESTION OF PRACTICE.

The case of *Bowker Fertilizer Co. & Cameron*, noted in the present issue, settles a question that has frequently come up in the Superior Court, namely, where security for costs of suit is asked by motion, whether the motion must be made within four days after the return of the writ, or whether it suffices to give notice of the motion within four days. There has been some contrariety of opinion, but the majority of the judges have been disposed to make these formal proceedings expeditious in their nature, and have held that the motion must be presented within the four days, the same as if a dilatory exception were filed. If the defendant were behind time he simply lost a privilege which the law accords in a certain class of cases. The Court of Appeal, however, has ruled in favour of a more lax procedure. It is now held sufficient to give notice of motion within the four days following the return of the writ, and the motion may be presented subsequently.

JUDGES AND PASSES.

The *American Law Review* for May-June, recurring to the subject of judges and railway passes, and quoting our remarks *ante*, p. 89, facetiously makes an exception in favor of Circuit judges in Virginia, and thinks that these ill-paid officers, "living on \$1,600 a year, are entitled to all the railroad passes they can get." It is poor economy to appoint ill-paid judges, especially where no absolute saving is effected, but, as sometimes occurs, an amount that would amply remunerate a sufficient number is distributed among an excessive supply of officials. Perhaps the Circuit Judges of Virginia may find a crumb of comfort in the fact that a great deal of the best intellectual work that has been done in the world—literary and scientific at least, if not judicial—has been poorly rewarded. Their brethren in Belgium, moreover, are existing on equally small salaries (*ante*, p. 161).

On the general question of judges accepting railway passes we find public opinion in the United States becoming more active. A recent issue of *Harper's Weekly* says:—"Great journals now pay their own way. They know that the only judgments worthy of attention are those of live-heads, not of dead-heads. And it is equally true of judgments from the bench as from the press, of the vote of the legislator as of the word of the critic. The contemptible bribery of 'dead-heads' by free passes of every kind ought to be suppressed by the voice of respectable opinion. But at a time when the sense of pecuniary morality is so relaxed a reasonable and stringent law upon the subject would be very efficacious."

FRENCH DIVORCE BILL.

Recent advices from France state that the Senate has adopted an amendment to the bill re-establishing divorce, permitting the wife to demand a divorce on the proof of adultery by the husband, even if the act is not committed under the conjugal roof. It rejected the amendment demanding that cruelty only shall constitute a case for separation, not for divorce.

A contemporary, referring to the proposed legislation, states that the provisions of the new French Divorce bill, if it passes the Senate as it left the Chamber, will constitute a great departure from the principle of indissolubility. To begin with, it sanctions divorce when either party to the marriage contract is guilty of infidelity. In the French Chamber the principle of treating sexes on a footing of equality in this matter was warmly defended by the majority, and carried on a division by a majority of 224 to 147. The bill allows either husband or wife to obtain a divorce for cause of (1) adultery, (2) cruelty, (3) serious insults, (4) a sentence of imprisonment for dishonesty or offences against public morals, (5) any ignominious punishment (*peine infamante*) other than banishment or degradation for political offences, (6) absence for a term of years. It also provided for divorces by mutual consent; but this provision was surrounded by many restrictions.

Any couple finding their married life insupportable, but not wishing to accuse each

other of any of the offences nullifying marriage, can make a declaration that they are no longer able to live together. This formal declaration must be supported by the acquiescence of three of the nearest relatives of both husband and wife, and repeated four times in the course of a year. The possessions of the household are valued, and one-half is settled upon the children of the marriage, to become theirs on attaining their majority. One of the parents must contract to undertake entire responsibility for bringing up the children. After all this is done the court will be empowered to pronounce a decree of divorce, but the divorced persons will not be allowed to marry again before the lapse of three years. In the case of divorce for adultery, cruelty, crime, or absence, no restriction is placed upon the remarriage of divorced persons, with the exception, that if a husband and wife after being divorced remarry each other, the State will not undo their contract a second time, unless one or other of this twice married couple is condemned to an infamous punishment. Three years after a judicial separation has been granted, either party can, on application, have it converted into a decree of divorce. It can also be so converted at the option of the court on the application of the injured party within a period of three months. Marriage with a co-respondent is permitted after divorce, it being naively observed by M. Naquet that such permission would inculcate the moral obligation of marriage and tend to limit adultery. The penalty affixed by the Civil Code to a wife's infidelity in case of judicial separation is abolished. A proposal that a settlement should be made in all cases upon the children of a marriage dissolved for specific cause was defeated.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, May 7, 1884.

DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

CHINIC et al. (plffs. below), Appellants, and GARNBAU (def. below), Respondent.

Agent—Trustees carrying on business of insolvents—Liability of creditors for losses incurred by trustees.

The plaintiffs were trustees under a deed of assignment from insolvents, with authority to carry on the business until it should be wound up, which was to be completed within two or three years. The business was not wound up in that time, but was carried on by the plaintiffs on an extensive scale with funds raised on their own credit, and large losses were incurred. Held, by the majority of the Court, in an action by the plaintiffs against creditors who had signed the trust deed, to oblige them to repay the amount of such losses, that the plaintiffs were not, under the circumstances, agents of the creditors, so as to make the latter liable for the result of their operations.

The judgment appealed from was rendered by the Superior Court (Meredith, C.J.), June 15, 1882. The following were the *considerants* :—

"The Court, etc.

"Seeing that the trust deed, bearing date the 16th of November, 1870, mentioned in the pleadings in this cause filed, was entered into by Nazaire Têtu & Co. (insolvent debtors) of the first part, by Cirice Têtu, (one of the members of the said firm), of the second part, and the plaintiffs, as trustees, of the third part, and that the creditors of the said Nazaire Têtu & Co., spoken of in the said deed, are not mentioned in the said deed as parties thereto ;

"Seeing that by the said trust deed, it was agreed by the parties thereto, namely, by the assignees, Nazaire Têtu & Co. and Cirice Têtu, one of the members of the said firm, parties thereto of the first and second part, and the said assignees, namely, the present plaintiffs, parties thereto of the third part, that all the creditors of the said Nazaire Têtu & Co., named in a certain schedule mentioned in the said trust deed, 'do ratify and confirm this assignment, and do, in consideration of such assignment, remise, release, and forever quit claim unto the said firm of Nazaire Têtu & Co., and all the parties thereof, of all claims and demands ;

"Seeing that in order to give effect to the said covenant, between the said insolvent debtors and the plaintiffs, the said creditors did afterwards put their signatures to the said trust deed, and by doing so they de-

prived themselves of the power of impugning the said deed of trust, and secured to the said insolvent debtors the discharge to which they were entitled under the said trust deed, but that the said creditors, by signing the said trust deed, cannot be regarded as parties creating the trusts established, or granting the powers given in and by the said trust deed; and that the said trustees, as regards the said creditors, were merely administrators of the insolvent estate, so assigned to them as trustees, and cannot be regarded as having been, as they the plaintiffs contend they were, the agents of the said creditors of whom the defendant was one, and that the said trustees had not any power as regards the said creditors or their property, beyond the interest of the said creditors, to the said insolvent estate so assigned to them as the said trustees;

"And seeing that, by the said trust deed so entered into between the said insolvent debtors and the said plaintiffs, it is amongst other things declared that the said trustees 'shall have full and ample power to pledge and hypothecate, if they think fit, all or any part of the said property, moveable or immoveable, hereby conveyed to them in trust, and with the money obtained by and through such pledging and hypothecating to carry on the said establishments at Escoumains and at Sault-au-Mouton, or either of them, to the same, or a greater or less extent than the same have been hitherto carried on by the parties of the first part, and it is hereby agreed that the said parties shall carry on the said establishments, and shall continue, there and elsewhere, as they may deem fit, the business of the said firm of Nazaire Têtu & Co., for the benefit of the creditors of the said firm and of the said parties of the first part as hereinafter mentioned';

"And that by the concluding clause of the said trust deed it was declared: 'It is well understood that the winding up of the said estate shall be made within two or three years from this date,' that is, within two or three years from the said 16th day of November, 1870;

"And seeing that the said estate was not wound up within the said period of two or

three years, and that even after the lapse of the said delay the business of the said estate was carried on by the said plaintiffs upon a more extensive scale than it had been carried on before, and that the plaintiffs, in order to carry on the said business aforesaid, raised a large amount of capital on their own credit, with which they carried on the said business, without having obtained the consent or concurrence of the said creditors;

"Seeing that, in pursuance of a resolution of certain creditors of the said estate, it was wound up in the year 1877, and that the result of the said liquidation of the said estate was that there was nothing whatever for the creditors, who were called upon not only to lose claims amounting to \$69,000, with seven years' interest, but also to pay the sum of \$73,334 to meet losses sustained by the plaintiffs in so carrying on the said business;

"And considering that although the said plaintiffs, as trustees, were by the said trust deed authorized to raise the funds necessary to enable them to discharge their duties as trustees, yet that they ought to have raised the required funds in their capacity as trustees and upon the strength of the trust property, and that the said trustees in raising, as they did, capital on their own credit, and in carrying on, as they did, extensive lumbering operations, with the borrowed capital so raised, (although they doubtless acted in good faith,) exceeded their powers; and, moreover, that whatever rights (if any) the said trustees may have, as regards the said losses, against the parties by whom they, the said trustees, were so named, they, the said trustees, cannot have any such rights against the creditors by whom they *were not named*;

"It is in consequence considered and adjudged that the action and demand of the said plaintiffs be and the same is hereby dismissed with costs in favour of the defendant."

In appeal the judgment was confirmed, the learned judges, however, differing as to the reasons of confirmation. The Chief Justice was of opinion that the appellants were *mandataires* of the respondent, but that they had administered imprudently and exceeded the terms of their trust. Justices Ramsay and Baby were of opinion that the appellants

were not *mandataires* of the respondent. Mr Justice Monk thought that the appellants were not *mandataires* of the respondent, and, further, that there had been maladministration.

The following opinion was delivered by

RAMSAY, J. This is an action based on a trust deed, by which the appellants undertook to carry on the lumber business of the firm of Tétu & Co., then on the verge of insolvency, and to pay off the creditors so far as the estate assigned to them by the deed would suffice, and to give the balance if any to Tétu & Co. The result of the transactions of the appellants was not successful, and the object of the action was to compel respondent, who was one of the creditors of Tétu & Co., to pay back certain dividends he had received on his claim, and to indemnify the trustees for the advances they had made and the losses they had incurred in executing the trust.

This action was met by a *défense en fait*, and by a special plea by which respondent in effect set up, first, that by the payment of the second dividend respondent who was indebted to Cirice Tétu, one of the firm of Tétu & Co., was completely disinterested in the operations of the trustees. Secondly, that by this payment, and by two other payments out of the funds of the said Cirice Tétu, the liabilities of the firm of Tétu & Co. were reduced to \$25,000, and that the estate was then able to pay off all its debts, if the appellants had sold off the property as they were authorized to do; but that instead of doing so the appellants carried on for their own profit the business of Tétu & Co. in violation of the powers conferred by the deed and at their own risk. Thirdly, that their administration was bad, vicious and grossly negligent, and that they had exceeded their powers.

The learned Chief Justice of the Court below dismissed the action, solely on the grounds that the appellants were not parties to the deed, and that although it was to some extent made in their interest, it was not generally a bargain with them but between Tétu & Co. and the appellants: the creditors are only parties ratifying

the deed. Now what is the effect of such a ratification? Chief Justice Meredith has thus stated the question:—

“If I ratify a deed entered into by another as my agent I make the deed my own; but if I ratify a deed entered into by others in the exercise of their own rights, and for their own interests, I merely deprive myself of the power of objecting to such deed, and undertake to do whatever by the deed I am required to do, but nothing further.”

And he concludes:—“Upon the whole, after giving to the trust deed the best consideration in my power, I can see nothing either in the letter or spirit of that deed, which would justify me in holding that under it, the trustees were the agents of the creditors. According to my view, the trustees did not represent the creditors in any way, or to any extent, except as regards their interest in the estate assigned. And yet, according to the contention of the plaintiffs, they had power not only to render valueless the claims of the creditors against N. Tétu & Co., but also to subject the creditors personally and jointly and severally to debts to an unlimited extent. For if, as the plaintiffs contend, they had power to make the creditors liable for the \$73,000, now alleged to be due to the plaintiffs, then the discretion of the trustees was the only limit to their power over the estates of the creditors.

“The capital obtained from La Banque Nationale from 1871 to 1876 was, as already mentioned, \$850,000, and, according to the contention of the plaintiffs, each of the creditors was personally, jointly and severally liable for the whole amount so borrowed.”

It appears to me that this is unanswerable as a general statement of the law; but has it no exceptions? Or rather, is this only a ratification of a deed entered into by others? I am inclined to think that this deed contains something more than a ratification of the acts of others, for there is at all events one clause which states that the consideration of the *transport* to appellants is the discharge of the Tétus. But this does not alter the question before us, for it is only an abandonment to the Tétus of all recourse against them in consideration of the cession they were about to make. From this I do not

think it can be assumed that the deed creates a mandate by the creditors to the appellants. The whole form of the deed is a mandate by the Têtus to appellants, and I cannot find any instance of a deed in this form being held to bind parties, however strongly interested they might be in the transaction, to obligations that are not clearly expressed. Their ratifying the deed is fully explained by the fact that without such ratification the deed might have been annulled for fraud. I attach no weight to the argument as to what probably or possibly the creditors might have intended to do. They were certainly interested in seeing an effort made to redeem the estate; but, on the other hand, it seems in the last degree improbable that they bound themselves jointly and severally to this terrible responsibility for such a chance.

I am to confirm.

Judgment confirmed.

Bossé & Languedoc for the appellants.

Hamel & Tessier for the respondent.

COUR DU BANC DE LA REINE.

Montréal, 21 mai, 1884.

Présents : Sir A. A. DORION, C.J., Hons. Juges
MONK, RAMSAY, CROSS, BABY.

DIXON et al., Appellants, & ERU, Intimé.

Facteur—Mandat.

- JUGÉ : 1. *Que le facteur ou agent d'un principal résidant en pays étranger est seul responsable, personnellement, envers les tiers.*
2. *Que les personnes employées par ce facteur ou agent, qui est leur mandant, ne sont pas responsables, personnellement, des transactions faites au nom de leur mandant.*

Voici les faits de la cause :

En 1880 les appellants Thomas Dixon, fils de James, et Thomas Dixon, fils de Thomas, tous deux de Joliette, furent chargés par un certain James S. Dixon, de Berthier, d'acheter, en son nom, en par lui payant, et d'expédier tout le foin qu'ils pourraient trouver dans Joliette, à Peckham, Ralph & Co., résidant aux Etats-Unis. Les appellants, comme employés de James S. Dixon, achetèrent une certaine quantité de foin de l'intimé, sur laquelle il resta due une balance de \$148.32, pour laquelle ils furent poursuivis et condamnés à payer par le jugement de la Cour Inférieure, qui se lit comme suit :

"La cour, etc., considérant que les dits défendeurs, en achetant le dit foin pour Peckham, Ralph & Co., comme sous-agents des dits Peckham, Ralph & Co., spécialement chargés de faire le dit achat par le dit James S. Dixon, de Berthier, agents des dits Peckham—sont responsables, vis-à-vis du dit demandeur, pour le prix du dit foin, comme agents représentant un principal étranger, en vertu de l'art. 1738, C. C.; et qu'il n'est pas prouvé que le dit demandeur ait renoncé en aucune manière, à exercer le recours qu'il a contre les dits défendeurs, pour le prix du dit foin ;

"Considérant que les dits défendeurs ont eu la possession du dit foin, qu'ils l'expédiaient eux-mêmes directement, aux dits Peckham, Ralph & Co., et qu'ils pouvaient facilement se protéger et protéger le dit demandeur, dont ils avaient acheté le foin, et qu'ils ne l'ont pas fait ;

"Considérant que le sous-agent d'un principal étranger est responsable de la même manière que l'agent principal ;

"A renvoyé et renvoie les défenses des dits défendeurs," etc.

La Cour d'Appel a renversé ce jugement comme suit :

"La cour, etc.

"Considérant qu'il appert, par la preuve, que, dans les transactions qui font l'objet de la demande, les appellants n'ont agi que comme les agents et les employés de James S. Dixon, leur mandant, résidant à Berthier, dans le district de Richelieu, et que l'intimé a transigé avec les appellants en cette qualité ;

"Considérant que les appellants n'ont encouru aucune responsabilité personnelle, envers l'intimé, pour les causes mentionnées en la déclaration en cette cause, et qu'il y a erreur dans le jugement rendu par la C. C. du district de Joliette, le 10 février 1883 ;

"Cette cour casse et annule le dit jugement et renvoie l'action de l'intimé, avec les dépens des deux cours."

Jugement renversé avec dépens.

J. N. A. McConville, pour les appellants.

Adolphe Germain, C. R., conseil.

C. P. Charland, pour l'intimé.

(A. G.)

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

DORION, C. J., RAMSAY, TRESIER, CROSS and BABY, JJ.

THE BOWKER FERTILIZER CO. v. CAMERON.

Procedure—Motion for security for costs.

A motion for security of costs may be presented after the expiration of four days from the return of the writ of summons, if notice thereof has been given within four days.

The plaintiffs moved for leave to appeal from an interlocutory judgment. The facts were as follows:—The writ was returned 12th April, 1884. T. P. Foran appeared for the defendant, and on the 15th April, notice of motion for security for costs was served upon the plaintiffs, the motion being presentable on the 29th April. The motion was presented on that day, and was opposed by the plaintiffs on the ground that it came too late; that the motion was in the nature of a dilatory exception and should have been of record before the court within four days from the return day, viz., on the 16th April, 1884. Judgment was, however, rendered, (Macdougall, J.), granting the motion, and ordering that security for costs should be given.

Hall, for plaintiffs, moved for leave to appeal from this judgment, submitting that the practice had long been settled, requiring the motion to be made within four days from the return day. Counsel cited *Melles et al. v. Swales*, 1 L.N. 566; *Cruickshank v. Lavoie*, 3 L.N. 37; *Adams v. McIntyre*, 3 L.N. 143; *Oliver v. Darling*, 3 L.N. 303.

DORION, C.J. This is a motion for leave to appeal from an interlocutory judgment granting a motion for security for costs. Notice of motion was given within four days of the return of the writ of summons, but the motion was not presented until several days after the return. The pretension of the plaintiffs is that the motion itself should have been made within the four days, i.e., that it is not sufficient that notice should be given, but that the motion should be presented within the four days. The reason urged is that the motion is in the nature of an *exception dilatoire*, and as the exception must be filed within four days, you are bound to file the motion within the same delay. A num-

ber of decisions of the Superior Court have been referred to, showing that the point has come up frequently, and the majority of the cases appear to sustain the plaintiff's pretension. The question, however, has never been decided by the Court of Appeal, and, as far as I am concerned, I must say that it does not appear to me to be a proper interpretation of the Code. The effect of the *exception dilatoire* is only that as soon as the party can be heard he will ask for security. The notice of motion is the same. The notice is, that as soon as the defendant can be heard he will ask for security. If the plaintiff does not contest, security can be given at once. If the defendant does not give notice that he will move for security he waives his right. But a notice is sufficient to show that he does not waive his right. We are all agreed that the Court below exercised a right discretion in allowing the motion for security for costs, and the petition for leave to appeal is, therefore, refused.

Motion for leave to appeal rejected.

Church, Chapleau, Hall & Atwater for the plaintiffs.

T. P. Foran for the defendant.

Barnard, Q.C., counsel.

SUPERIOR COURT.

MONTREAL, June 30, 1884.

Before JOHNSON, J.

LA BANQUE NATIONALE v. JOLY, and LANGLOIS, opposant.

Procedure—Execution—Title of opposant.

Where an opposition is made to the sale of real estate under execution, founded on title registered before the date of the seizure, the plaintiff may attack the opposant's deed as simulated without concluding for its rescission.

PER CURIAM. In this case, the plaintiffs have taken in execution of their judgment against their debtor Joly, the property which he is in the actual occupation of. The opposant comes forward with his title and claims the property seized as owner, and says not only that he was the sole and registered proprietor of it, at and before the time of the seizure; but the fact was well known to the plaintiffs when they caused the seizure to be made *super non domino et non possidente*.

The plaintiffs contest this, and say the op-

posant has no right of property in the house and land seized; that he never had possession, and that the deed by which he pretends to have acquired from Lafond is simulated, the opposant being merely the *prête-nom* of the defendant for whose interest the opposition is made.

This contestation was met by a demurrer, which was dismissed, but it has been brought up again at the merits, and is, therefore, still before the court *au fond*. It gives two grounds: 1st, that the contestants do not ask to annul and set aside the deed; 2nd, that the conclusions merely asking the dismissal of the opposition, are insufficient. Both these reasons mean the same thing, viz.: that the contestant could not ask for the dismissal of an opposition founded on an apparent title, without at the same time asking that the title should be set aside.

There is nothing, I think, in either or both of these objections. The contestants do not recognize any existing title at all in the opposant. They say he has no title, that it is a sham and has no existence, and they do not, of course, ask to set aside what they say does not exist. Therefore the demurrer was properly dismissed.

The substantial question, however, a question of fact, is whether this title of the opposant is a reality or a pretence to protect Joly. The other point, whether it can be raised under a contestation to an opposition, or requires a direct action against the ostensible registered owner, is not in my opinion of so much consequence as it seemed at the hearing. For whether the title of the opposant be good or bad is the sole question, and if he comes forward with a deed as evidence of his title, he must submit to hear it said by his opponent that his deed is no deed at all. It was argued that this man who lives in another district, where this property is situated, was entitled to be sued in his own jurisdiction, and I see that in the cases of *Tempest & Baby* something of that kind was alluded to by the learned Chief Justice; but I do not think it is a very important consideration, for after all, as far as that consideration goes, it would be merely a question of costs. The title invoked by the opposant is either real or fictitious. The opposant chooses his

own mode of asserting his title. I do not discuss at length the law as affecting this particular question. I merely say that as between these parties the question is properly raised. I have had before me, I believe, all the authorities and cases on this point. It is hardly fair to put it in the form of saying you can't question a man's title by seizing his property in the hands of your debtor. You do not question his property by seizing the apparent property of your debtor. You only say to your debtor: "That appears to be your property; I find you in the occupation of it, and I seize it." You do not attack the real owner at all. You only act within the limits of the art. 632, C.P.C., if your debtor is reputed to be in possession of the property seized *animo domini*. Having done that; having acted within the law as far as the fact of his possession can be ascertained, the real owner appears with his opposition. He surely cannot contend that what he alleges is *incontestable*. If he has no real title, but merely a fictitious one, the creditor must be allowed to tell him so, and to show it if he can. I will merely cite one authority: Pothier, Ed. Bugnet, p. 242, No. 526. After stating the general principle contained in our article 632, the author says: "Observez néanmoins, que l'on entend par propriétaire non pas seulement celui qui l'est en réalité, mais encore, celui qui possède l'héritage *animo domini*, soit qu'il en soit véritablement le propriétaire, soit qu'il ne le soit pas." The note at the foot of page 243 adds: "Sur le propriétaire apparent." Vide passim *Marcadé*, Vol. 10, p. 58, last edition; 24, 31, 32 and 33, A. L. R.; 19 *Laurent*, No. 603; *Daloz*, Rep. Verb. Obligation, No. 3,114; 6 L. C. Rep. 489; 4 *Rév. Leg.* 461; 3 L. N. 66; *Queb. L. R.* 301; 2 L. C. Law Journal, p. 37, *Masson v. McGoun*.

In *McCorkill v. Knight*, the Court of Appeals, and subsequently the Supreme Court, adopted the principle which runs through all our cases on this subject, that the party invoking the nullity of such a seizure must show that his possession and title are founded not on deeds that are false and simulated, and having no real existence: the points being not merely the validity, but the existence of the ownership, and the possession *animo domini*.

The real question in the case, however, is the question of fact I have already alluded to. Do all the transactions between Joly and his friend Langlois show sufficiently and clearly that Joly is the real owner, and Langlois is only the pretended owner? It is very difficult to give a confident and decisive opinion on this question. It is a question of appreciation of evidence, and of inference from facts. I have weighed it all as carefully as I can, and I have come to the conclusion that although the circumstances may show clearly, that in all Langlois did he was desirous of protecting his friend Joly from the hostile action of his creditors, there is nothing to show that he (Langlois) is not the real owner. Creditors are suspicious naturally enough under such circumstances, but that is a very different thing from saying that Langlois is to lose his property, or that any hope or design the parties may have had that Joly might some day become the owner, is to expose Langlois to lose his present rights.

Opposition maintained.

C. L. Champagne, for opposant.

Geoffrion & Co., for plaintiff contesting.

GENERAL NOTES.

An esteemed correspondent at Quebec, with the tone of whose communication we certainly have no reason to be dissatisfied, thinks a recent reference to our "modern legislators" to be somewhat *déplacé*, in the columns of the *Legal News*. Our correspondent is perfectly right in assuming that we do not propose to allow politics to intrude upon our space. At the same time it may be remarked that the *Legal News* is not exclusively (as our correspondent implies) a mere report of judicial proceedings. It is an independent journal devoted to legal topics, and, as such, it follows the course adopted by the leading journals of the law in England and the United States, in offering a free and unbiased criticism of such matters pertaining to the law, and to law-makers and administrators, as may seem to merit attention.

The manner in which certain lady taxpayers propose to demonstrate their fitness to take part in the government of the country—namely, by lawlessly declining to pay the Queen's taxes—will be found attended with some difficulty. The maxim of law that an Englishman's house is his castle may be admitted to extend to an Englishwoman, so that if she keep her door shut against the sheriff's officer, armed with the ordinary writ of *fi. fa.*, the blockade cannot be raised by breaking the door open. Crown debts are, however, not recovered by a *fi. fa.*, but by the more effective weapon of a 'writ of extent,' under which the 'body, land, and goods' of the fair recalcitrants would be seized.

The seizure of their bodies would delight these candidates for martyrdom, but the necessities of the revenue would be fully answered by taking their property. If they shut their doors against the sheriff, he will be bound, after politely asking them to surrender, to break the doors open by force. This law is at least as old as the reign of James I. It is reported by Lord Coke in *Semayne's Case*; and, although Lord Coke did not get on well with the ladies of his family, he was a very accurate reporter.—*Law Journal* (London).

In commenting upon Eno's case, the *Evening Post* points out that an offence, in order to be extraditable, must be the offence understood by the name given to it in the treaty in both of the countries which are parties to the treaty and not in one only. There is no doubt that the offence charged against Eno is not forgery in England, and that an indictment against him for forgery would not lie in England. The *Post*, however, seems to assume that Eno has committed what may be described as "American forgery," and that is not the case either. He has only committed New York forgery. Many American decisions go the length of the English doctrine, quoted by the *Post*, that "telling a lie does not become a forgery because it is reduced to writing." In Massachusetts it has been held "that the mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime." The cookery of accounts to cover an embezzlement is forgery by the statute of New York only, and, of course, it is even more preposterous to maintain that the extradition treaty must be construed by the statutes of one State than if such a construction were general in this country.—*N. Y. Times*.

The *Washington Law Reporter* gives the following statement of three months' work of the United States Supreme Court:—"The last volume, 109, of the United States Supreme Court Reports, covers a period of three months, October 15, 1883, to January 7, 1884, and in that time shows 90 cases decided by the court. Of these the chief justice delivered the opinions in 20, Judge Blatchford in 13, Matthews in 13, Woods in 12, Gray in 9, Bradley in 6, Harlan in 6, Miller in 6, and Field in 5. There were 12 dissenting opinions, of which no less than 5 were by Judge Harlan, 3 by Field, 2 by Gray, and 1 each by Miller and the Chief Justice. The longest opinion in the volume is that in the *Civil Rights Cases*, *U. S. v. Stanley*, which covers 59 pages, of which 36 are devoted to Judge Harlan's dissent."

W. D. Thompson, in the *American Law Review*, says of the late Charles O'Connor:—"He was a model to the bar and an honor to his country. He used no dishonorable means to win the favor of a jury. He was no orator; but by plain statements of facts well marshaled he rarely ever lost a doubtful case. As a man, his character was unimpeachable. He was honest, stern, upright, and noble. He was seldom known to smile. He was like the younger Pitt: 'Modern degeneracy had not reached him.' No political corruption, state chicanery, or bribes could induce him to swerve from the path of duty. All his sayings and actions bespoke of energy and a powerful intellect."

The Legal News.

VOL. VII. JULY 12, 1884. No. 28.

BOWKER FERTILIZER CO. & CAMERON.

Our correspondent "E. B." draws an inference from our brief note on this case which the words do not justify. We did not intend to offer, and we did not offer, any criticism upon the ruling in appeal, save this, that the practice which had been followed for some years in the Superior Court, tended to greater expedition. For the rest, the Court of Appeal was called upon for the first time to interpret a portion of the Code of Procedure, and, of course, it was in no way bound by the rulings of the lower Courts. Moreover, it is of comparatively small importance in what manner a question of this kind is decided, so long as it is finally settled, and the profession have an authoritative ruling to guide them.

No one has questioned the policy of requiring security to be given: the only point was whether the law required the demand to be made within four days. If it did, it would not be a hard law. If a defendant is compelled to appear within one day, there would be no hardship in requiring him to ask for security within four days.

The question of exacting security from resident plaintiffs is a different one, and we must say that we sympathize to some extent with the remarks of our correspondent on this subject.

THE VACATION.

The long vacation commenced July 10. By an Act passed at Quebec during the last session, but which is not yet in force, the summer vacation will in future begin July 1, and extend to August 31 inclusive. It is also enacted that the Courts shall not be obliged to sit between December 20 and January 15, or between August 31 and September 10.

These intermissions are extremely beneficial to hardworked professional men, for though business of certain kinds proceeds, and has to be attended to throughout the year, yet the members of firms are enabled to divide the vacation between them, and to obtain in turn the total change so much desired, by flight to other scenes. Although life in our northern metropolis is not at the high pressure of more excitable cities, yet the following remarks from the *American Law Review* are applicable here:—

"Overwork is the bane of the time. Professional men and business men alike wreck themselves by excessive, unremitting toil. Hence, so many shattered nerves, early and sudden deaths, and disabled brains. So well recognized is this that we assume our readers, whether busy or not, weary or not, are already planning for a vacation. They owe this to themselves, their dependents, and their clients. It is a mistake, almost always, to say one cannot afford a vacation. The opposite is more nearly true. If one craves the gayeties of Saratoga, or of the seaside watering places, and can afford it, very well; though, to our notion, nature, and not society, is to be preferred by him whose brain needs rest, and whose nerves need quiet. In any event every one should for weeks, and, if possible, months, of this summer, quit the city and town for the pure air of the country. Go somewhere away from business and care and away from study. Do this, whether well or ill. It will help the strong to remain strong, the feeble to regain what they have lost."

The *Law Review* proceeds to speak of the places to which members of the profession may betake themselves. On this point we shall only say that if any of our contemporaries or brethren of that ilk chance to visit this "fringe of the Arctic zone" in the course of their holiday rambles, it will be a great pleasure to us to see them, and that we may usually be found at our office throughout the vacation between the hours of noon and five p.m.

SECURITY FOR COSTS.

To the Editor of the *LEGAL NEWS*:

SIR,—The impression left by your remarks in connection with the decision of the Court of Appeals in the case of *Bowker Fertilizer Co. & Cameron* is that you look upon that decision as a step backwards. In this, if I may be permitted to say so, you fail to appreciate the real bearings of the question. To reason as if a demand for security for costs were to be unfavorably treated, as most preliminary

exceptions are treated, and properly so, no doubt, is to mistake the character of a demand of security for costs in the case of foreigners. Such a demand manifestly cannot be confounded with that kind of pleadings which is generally resorted to for the mere sake of delay. It is a fair demand in every respect, and as the *fact* appears, as a rule, on the face of the writ—the *right* cannot be questioned.

This is obvious enough and the best evidence that the proceeding is a favorable one is that it is allowed to take the form of a motion unaccompanied by a deposit, although the code classes it among dilatory exceptions.

I should say that, on principle, a foreigner should be liable to be called upon at any stage of the proceedings to give security for costs.

I would go further still and would hold that with the view of checking unjust claims, the costs, in all cases, should be secured in some proper manner in the case of resident plaintiffs, as well as in the case of non-residents.

In France under the ordinance of 1667 the payment of costs was enforced by imprisonment, at the discretion of the judge, and such, I believe, is the law in England now. And this is as it should be, since the institution of suits without justification is a species of personal wrong (*délit*).

With us the most frivolous suits are brought, not unfrequently too by plaintiffs who proceed in *forma pauperis*,—and their dismissal entails in some instances the expenditure of much time and heavy amounts. It is a hardship and a nuisance that the costs should not be secured, in cases of that sort at any rate. Our courts, I believe, have, as the law stands, the power to order imprisonment for the costs, in cases where the institution of the suit and its prosecution constitute a personal wrong (*délit*). When they exercise that power, and the time is not distant when for their own protection they must, the propriety of giving every facility to a defendant to obtain from a foreigner the security which the nature of the case admits of will no longer require to be enforced by argument.

A. B.

NOTES OF CASES.

COUR DU BANC DE LA REINE.

MONTREAL, 31 mai 1884.

DORION, Juge en chef, MONK, THESIER, CROSS, BABY, JJ.

LAREAU v. DUNN et al.

Exception de bornage—Identité d'un lot constatée par tenants et aboutissants—Possession de bonne foi—Articles 412 et 417 C. C.

Le 28 août 1877, William McGinnis prit une action pétitoire contre Pierre B. Lareau. Il est allégué que le demandeur a acheté, le 11 novembre 1854, des MM. Keyes, cinq lots de terre, 3 x 30, situés dans la 8^{me} concession de la paroisse de Ste. Brigide, savoir, les lots Nos. 99, 100, 101, 102 et 103. Le défendeur Lareau acheta du seigneur Rallond, le 18 mai 1857, le lot No. 104, 3 x 30, voisin par conséquent des lots de McGinnis. Le lot No. 105 fut vendu par le seigneur Rallond le 10 décembre 1851, à Moïse Daigneau, qui se trouvait par conséquent le voisin sud du défendeur Lareau. L'action pétitoire allègue que le défendeur Lareau, au lieu de prendre possession du lot 104, prit possession et occupa le lot 103, la propriété de McGinnis. Lareau posséda à titre de propriétaire le lot qui lui avait été concédé et le cultiva pendant au-delà de vingt ans sans inquiétation, au vu et su de McGinnis. Finalement, en 1877, ce dernier s'aperçut qu'il lui manquait deux arpents et neuf perches de longueur sur 30 arpents de profondeur; il en conclut que le défendeur était en possession du lot qui lui manquait.

Le défendeur a plaidé à cette action, 1^o par des exceptions de prescription trentenaire et décennale; 2^o par une fin de non recevoir, alléguant que les procédures auraient du commencer par l'action en bornage; 3^o par une exception d'impenses.

La contestation fut liée sur ces prétentions.

Le 28 décembre 1878 la Cour Supérieure d'Iberville rendit un jugement interlocutoire par lequel les exceptions de prescription sont rejetées, et ordonne en même temps la nomination d'experts arpenteurs. Ces derniers firent un rapport favorable aux prétentions de la demande. Sur motion du défendeur

pour le faire rejeter la Cour rendit un second jugement interlocutoire, le 29 décembre 1879, par lequel elle renvoie la motion, mais admet en même temps certaines irrégularités, obscurités ou contradictions. Elle ordonne qu'une action régulière en bornage soit prise tout en tenant en suspens l'action pétitoire. Sur l'action en bornage, Joseph H. Tessier, arpenteur, fut nommé du consentement des parties. Le rapport de cet arpenteur fut favorable aux prétentions du défendeur Lareau; il conclut que sa possession est en tout conforme à son titre; en conséquence qu'il détient ce No. 104 de la 8me concession de Sta. Brigide. Le 31 mars 1883, la Cour adopta les vues des premiers arpenteurs et rejeta les conclusions de Tessier, et le 19 mai 1883, elle rendit un jugement final par lequel elle condamne Lareau à délaisser l'immeuble revendiqué, à payer les frais des deux actions pétitoire et en bornage, plus la somme de \$1,184.50 représentant les fruits perçus par le défendeur pendant la détention de l'immeuble.

Au cours du procès, M. W. McGinnis étant décedé l'action fut reprise par ses héritiers et ayant-cause, Dame E. D. Dunn, ès-qual., et al.

Appel fut interjeté de ces jugements.

Le 31 mai la Cour d'Appel infirma les décisions de la Cour Inférieure. Voici les considérants du jugement :

"Considérant que par acte de vente du 18 mars 1857, l'appelant a acheté de l'honorable Jean Roch Rolland, alors seigneur de la seigneurie de Monnoir, le lot de terre désigné au dit acte comme étant le No. 104 dans l'augmentation de la dite seigneurie, contenant trois arpents de front sur trente arpents de profondeur, plus ou moins, bornée en front par les terres de la septième concession, en profondeur par les terres de la neuvième concession, d'un côté par William McGinnis, d'autre côté par Moïse Daigneault, sans bâties et en bois debout;

"Considérant que cet acte a été enregistré et que depuis la date du dit acte, le dit appelant a été, jusqu'à l'institution de cette action, le 20 août 1877, c'est-à-dire pendant plus de vingt ans, en possession du dit immeuble sans trouble ni inquiétation quelconque;

"Considérant qu'il appert par la preuve en cette cause que le lot que le dit appelant a ainsi possédé est bien le lot qu'il a acquis du dit Jean Roch Rolland, joignant d'un côté le lot No. 103 appartenant aux intimés—comme représentant feu William McGinnis, et le No. 105 qui appartenait à Moïse Daigneault, lors de la vente faite à l'appelant;

"Considérant qu'il y a erreur dans le jugement interlocutoire du 25 décembre 1878 qui a prématurément rejeté les exceptions de prescriptions de dix et de vingt ans avec titres, avant de déterminer si l'appelant possédait réellement le lot qu'il avait acheté de l'honorable Jean Roch Rolland le 18 mars 1857, et en rejetant l'exception par laquelle l'appelant opposait à l'action du demandeur ce moyen, qu'il aurait du procéder par action en bornage et non par action pétitoire, la preuve ayant constaté qu'il était nécessaire de procéder au dit bornage, ce qui a été reconnu plus tard par la Cour de première instance, qui a elle-même ordonné qu'une action en bornage fut intentée afin de déterminer les limites des héritages des parties avant d'adjuger au pétitoire;

"Considérant qu'il y a erreur dans le jugement interlocutoire du 29 décembre 1879, qui, avant d'adjuger sur l'action pétitoire, a ordonné que les procédés sur cette action fussent suspendus jusqu'à ce que le demandeur, que représentent aujourd'hui les intimés, eut adopté les procédés nécessaires pour déterminer la ligne délimitative des lots 103 et 104 par la voie d'un bornage régulier;

"Considérant qu'il y a également erreur dans le jugement interlocutoire du 31 mars 1883, qui a ordonné, entre l'appelant et les intimés, un bornage dans la prétendue ligne de division entre les lots 103 et 104 tout en déclarant que l'appelant n'avait aucun droit au lot qu'il avait possédé depuis le 18 mars 1857 en vertu de l'acquisition qu'il en avait faite de l'honorable Jean Roch Rolland, ce qui le rendait incompetent pour procéder à un tel bornage;

"Considérant qu'en supposant que dans l'acte de vente du 18 mars 1857, il y aurait eu erreur dans la désignation du numéro de l'immeuble vendu, cela ne pouvait affecter l'identité du lot qui était désigné par tenants et aboutissants et comme joignant

d'un côté le lot appartenant à Moïse Daigneault;

"Et considérant que lors même que le lot que l'appelant a possédé depuis plus de vingt ans ne serait pas celui qu'il a acquis par l'acte du 18 mars 1857, sa possession, qui a duré plus de vingt ans sans interruption à la connaissance des intimés et de leur auteur, aurait été de bonne foi, et dans le cas d'erreur, aurait été basée sur une erreur commune, et qu'à raison de sa bonne foi, et en vertu de l'article 412 du Code Civil, l'appelant a fait les frais siens, et qu'il ne pouvait être condamné à payer une somme de \$1,184.50, mais qu'au contraire il aurait le droit de répéter ses impenses et améliorations aux termes de l'article 417 du même code;

"Considérant que l'action pétitoire du dit William McGinnis, que les intimés représentent, est mal fondée;

"Considérant que l'action en bornage portée par le dit William McGinnis en ordre de la Cour de première instance comme incidente à la dite action pétitoire, est aussi mal fondée;

"Considérant qu'il y a erreur dans le jugement final rendu par la Cour Supérieure siégeant dans le district d'Iberville le 19 juin 1883;

Cette Cour casse et annule les dits jugements interlocutoires et le dit jugement final, et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, renvoie tant l'action pétitoire que l'action en bornage intentées par feu William McGinnis, représenté par les intimés, et condamne les dits intimés à payer à l'appelant les frais encourus sur ces deux actions en Cour de première instance, moins les frais d'arpentage qui seront divisés entre les parties, et cette Cour condamne de plus les intimés à payer à l'appelant les frais encourus sur cet appel, et ordonne à Germain Chouinard, séquestre nommé en cette cause, pour régir et administrer le dit immeuble réclamé en cette cause pendant le litige, de livrer la possession du dit immeuble au dit appelant, avec réserve de tout droit à une reddition de compte, et la Cour sur motion de Edmond Lareau, Ecuier, Avocat de l'appelant, lui accorde distraction de frais."

L'hon. juge Cross, dissident.

Edmond Lareau, avocat de l'appelant.

Barnard, Beauchamp & Barnard, avocats des intimés.

SUPERIOR COURT.

COTEAU LANDING, July 2, 1884.

Before JOHNSON, J.

FLAVIEN CHOLETTE, Petitioner, and JAMES W. BAIN, Respondent.

The Soulanges Election Case—Dominion Elections Act of 1874 and Amendments—Intimidation—Corrupt Practice.

The serving of a notice upon persons, warning them that they are not entitled to vote, and threatening them with the legal consequences if they vote, is not an interference with the exercise of the franchise.

Where voters drank and caroused on the road to the poll, but there was no evidence of treating by an agent of the candidate, held not to affect the election.

PER CURIAM. This petition asks that the election of last December should be set aside, and the respondent be personally disqualified. It includes in its allegations all the acts of corruption known to the law.

The respondent's answer is an express denial of the truth of every averment in the petition, and also denies the alleged qualification of the petitioner. There is a formal admission of what is alleged in the petition from allegation No. 1 to No. 5 inclusively—covering the holding of the election at the time alleged—the nomination on the 20th and the voting on the 27th December. That the candidates were Mr. Bain and Mr. DeBeaujeu, the former of whom was returned, and his return published in the *Official Gazette*, and that the petitioner is a qualified elector.

Ninety-nine particulars were contained in the bill filed by the petitioner, and six days were taken to hear the witnesses; 108 in number for the petitioner, and 20 for the respondent.

A great number of the particulars were touched more or less by the evidence, but the cases relied upon finally at the hearing are few in number.

There is first of all what I may call the principal case, from the point of view of the petitioner—and I must say it was put with great ability by Mr. Monk—that part of the case which rested on a plan argued, and supposed to have been agreed upon by the respondent and his agents, to prevent a number

of the supporters of Mr. DeBeaujeu from voting. It was said for the petitioner that the previous election between the same candidates, and which had been set aside, had resulted in a majority of only three for Mr. DeBeaujeu; and thence it was argued that there was an object—a necessity to redouble every effort on the respondent's side—and that every vote became almost vital to the contest. This is true, no doubt, to that extent; but it was pushed, I think, a little too far when it went to saying that this accounted for, or rendered necessary, the resort to undue influence or intimidation of the sort complained of here. The respondent may have legitimately desired to get all the votes he could and to exclude all the votes he could, but not necessarily to do either the one or the other by illegal means. There may have been an object legal or illegal, without a plan, or a conspiracy as it was even called. No doubt it may have been expected that the contest would be a close one, but plan or no plan, the question is whether there was an attempt by intimidation to prevent the votes being given. The point is whether the respondent broke the law: not what were the temptations to his doing so, but whether he yielded to such temptations.

Now, taking this charge as a whole, and comprising all the various means alleged to have been used to intimidate the voters, and prevent them from voting, it may be shortly stated to be this: at the previous election a number of voters had been reported by the judge, and there had been actions for penalties importing disqualification against some of them; and when the present election came on, the respondent and his supporters seem to have been of opinion that these persons could not validly vote, and they asserted, and tried to give effect to this pretension both by words and by deeds. They made speeches, and they served printed notices on the objectionable voters. We have these speeches and these notices before us. They are proved by Mr. Cornellier, Mr. Paradis and Mr. Champagne and many others, as far as the speeches are concerned; and the notices are printed and speak for themselves.

If there were any doubt as to the meaning of Mr. Cornellier's speech at St. Zotique (and

making due allowance for party feeling, I really think that the witnesses on both sides agree pretty much as to what was said,) there could be none as to what was really meant; for unless we assume that they meant one thing on one day and another on another day, we have in writing in the notice just what was the position taken by the respondent and his agents in this matter; and it is not pretended that the tenor of the speeches was different from that of the notices.

This is the notice *verbatim* :—

Je, soussigné, agent dûment autorisé de James William Bain, écuyer, l'un des candidats à la présente élection, objecte au vote de Charles Cholette fils, de St-Zotique, électeur, apparaissant à la liste électorale de l'arrondissement No. 8, et qui s'est présenté pour voter sous le numéro huit du cahier de votation du Poll No. 8.

Et pour raisons au soutien de cette objection, je déclare en ma qualité susdite que je m'objecte à ce que le présent électeur ne donne son vote, attendu que par jugement prononcé le six octobre dernier (1883) à Coteau Landing, dans la cause de contestation d'élection, dans laquelle Stanislas Filiatreault, commerçant du Coteau Landing, était pétitionnaire, et G. R. L. G. H. S. de Beaujeu était défendeur et inscrite sous le numéro trois des dossiers de la Cour Supérieure siégeant sous l'acte des élections fédérales contestées de 1874 et amendements, le dit jugement prononcé par Son Honneur le Juge Loranger—le dit Charles Cholette fils, après avis, dûment signifié sur lui et trouvé suffisant par le dit jugement après contestation, a été trouvé coupable de manœuvres frauduleuses et menées corruptrices au sens du dit acte, et rapportées en conséquence à l'orateur de la Chambre des Communes du Canada, et que partant il est devenu électeur déqualifié (scheduled briber) au sens de la section 104 du dit acte des élections fédérales contestées de 1874 et amendements, et ce pour huit années à venir à dater du six octobre dernier 1883, et qu'il ne peut voter à la présente élection.

Je requiers également l'assermentation du dit Charles Cholette fils, et demande que la présente objection soit notée au dos du bulletin qui sera délivré (si aucun ne l'est) en par le sous-officier rapporteur mettant au dos du dit bulletin, s'il en délivre un, le même numéro que celui de l'objection pour que sa décision puisse être révisée par la Cour, au cas de scrutiny.

St. Zotique, 27 décembre 1883.

A. CORNELLIER,

Agent autorisé de
J. W. BAIN.

Now that notice may be objectionable as to the requirement to make a note of it upon the ballots of the voters: I think it was objectionable in that respect, and if this were a scrutiny of votes to ascertain the majority, very possibly those ballots so marked would

be set aside ; but it is not that—neither is it a proceeding for a penalty against a returning or deputy-returning officer. I am asked to look at this matter as one that may avoid the election, and dispose of the rights of the electors ; and unless I can find that what was done amounted to undue influence and intimidation calculated to prevent the votes being given, I cannot say that there has been no election on account of the steps taken with respect to these persons supposed to have been disqualified. Now what was done by the agents in their speeches was to contend that these men could not vote validly : not to contend that they could not vote at all ; on the contrary, the express words sworn to by Mr. Cornellier were : “ Vous pouvez voter, mais seulement nous nous prévaudrons de notre droit pour vous en punir, et pour mettre de côté les votes que vous donnerez.” He warned. He did not threaten. He gave notice that he would exercise his right under the law of the land ; not to prevent the vote being given ; but to prevent the effect of it afterwards. As a general thing I should say that a threat must be of something within the power of the party threatening, of something that he could do or effect of himself ; and that to say you will abide by the law or by the judgment of the courts upon the law is not of itself unlawful. I do not deny that there may be cases where a threat that you will put the law in force against a person if he votes one way or another, or if he votes at all, may be unlawful. Where the warning conveyed is a mere pretence to affect the vote would be an instance ; and there are others that will occur to every one ; but there is nothing of that kind here. The notice makes it plain that what the party wanted to do was to prevent the effect of votes that he considered illegal, and to take steps to preserve his right in case of a scrutiny. The same notice in substance was given, on behalf of the candidate not returned, to one of the voters (Jules Leblanc), and it was accompanied by the same objectionable (as I think) requirement to note the protest on the back of the ballot. This, of course, would prove nothing, except that at the time the thing was being done, Mr. Champagne, who was the agent who did

it, did not look upon the proceeding as an improper one. In my opinion the great object of the law is to provide for freedom of election—not for freedom of voting merely, but for freedom to all the electors to assert their rights and pretensions in a legal manner ; and I cannot see that anything more than that was done in connection with this charge. It should be said also that not one of these persons was prevented from voting, but on the contrary they voted, every one of them. The law which is invoked is directed against the exercise of *force, violence or restraint, or threats of inflicting injury, damage, harm or loss, or in any manner practising intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting, or interfering with the free exercise of the franchise.* I do not find that the exercise of the franchise was interfered with at all, but means were taken to preserve the right of questioning the validity of the votes, after the franchise should have been exercised. I therefore do not extend my examination of this charge to ascertain if this was one of the cases where a threat to resort to the law may have been made in an abusive manner. I say that, as a general thing, to threaten persons with the legal consequences of an act is to tell them to keep within the law ; and to tell them of the consequences of their act, with a view merely of announcing your dissent from their right, and your determination to raise the question properly after the vote is given, is not to infringe the law with a view to prevent the vote being given. These observations are intended to apply not only to the announcement by Mr. Cornellier at St. Zotique, and to the printed notices to the voters, but to all the other instances, of which there are several, where the supporters of Mr. Bain told any of these men that their votes would be objected to. Upon the whole of this subject, considering the technical difficulties in their way, and there being only one list of voters, both for federal and for provincial elections, I do think upon the whole, apart from the marking of the ballots, which was objectionable, but was not an impediment to the vote being given, that the respondent's agents took reasonable measures to raise a question of

law merely, and though I do not say that it is always a necessary part of undue influence that there should be the express intention if the act is of a nature to influence unduly; yet I cannot see that the steps taken here could impede the giving of the vote at all. On the contrary, there is express evidence that Cornellier said: "Je ne vous dis pas que vous ne pouvez pas voter; au contraire, je vous dis que vous pouvez voter;" and the concluding words of the notices show distinctly that the right to object was intended to be reserved, and to serve in case of a scrutiny.

The next two charges related to Liboiren getting work for Vendette at Mahen, in chopping wood; and to the case of Charbonneau, a cripple and a beggar, but a voter for all that, who got broken victuals from Mme. Hudon. I am clear that neither of these cases had anything to do with the election.

The charges against Dutrizac and against Sauvé, were admitted to be without importance.

The case which was noticed next in order was one upon which there was certainly something to be said, and to which the learned counsel for the petitioner did full justice from his point of view.

It consisted in this: There were some votes, two or three I think, at or near a place called Fournierville, where one Morille Malbœuf, who was not a voter, resided. Before the polling Liboire Constant wrote to Malbœuf and asked him to give notice to the electors about there of the day fixed for voting. Malbœuf did so, and the day before the polling, they all came down together as far as Kenyon where they took the railway, and came on to vote, and on the road they all drank, and one of them at least, was a good deal the worse for it. There is no doubt this man, Malbœuf, looked upon the occasion as one of great fun and hilarity. He said: "*nous allons nocer*." If this word were the equivalent of the latin '*nocere*,' it would have been an unconsciously correct expression. They all appear to have taken too much—and he himself in particular: but the charge, if it has anything in it, means that Liboire Constant treated them to get their votes—as to which there is absolutely no evidence

at all. Then, if it were contended that Malbœuf himself were the party treating,—and it *was* so contended—(and the particular was amended by leave of the Court to include that) there would still be no evidence of agency. The request to give notice of the day of polling made Malbœuf a messenger or agent for that purpose, but no further. He was not an elector himself, and the others all had their minds made up when they started as to whom they were going to vote for, and no inducement of any kind appears to have been either required or used. The question is, was there any treating by an agent of the candidate—and there is no evidence that there was. The voters themselves caroused on the road; and when they reached Kenyon, their passage was paid on the railway; but that has nothing to do with the charge of treating, nor is there any evidence, how or by whom it was paid. It certainly was not paid by Malbœuf, though he knew it would be paid; for he told Seguin so. I am afraid there is no law efficient to prevent men from making beasts of themselves, though there is to prevent them from making beasts of others in order to get votes.

One François Lalonde, who was an agent of Mr. Bain, was charged with making a promise to Jos. Lalonde. Jos. Lalonde says the other asked him to vote if not for, at all events, not against them, and on the voting day, they met again, and François Lalonde said: "*Je m'en souviendrai*." This is admitted to be very vague; and it may mean possibly either to convey thanks for his vote, or the reverse; but we have no means of knowing how he voted, and cannot decipher what was meant: certainly if it was a promise, it would be difficult to say of what, and François Lalonde on his oath denies using the words.

The case of Stanislas Filiatrault was: 1st, that he had sent money to Guilbault to come and vote—which is contrary to the fact proved. He certainly said that he wanted to send Guilbault \$4; but the money never was sent; 2nd, that he had paid the taxed expenses of some witnesses. The list of these payments was produced; it is a list of persons taxed and paid at different times with money received for that purpose from

the Clerk of the Court, and was quite unconnected with any inducement to vote. As to his conversation with Devau, he appears to have kept the amount of the taxed expenses to pay a private debt; but it had nothing to do with the election. Devau says this was before the election—Filiatrault says it was during the election; but his son was present, and confirms what he says.

The last case argued was that of Firmin Hudon, for giving a railway ticket to Arsene Theoret. Hudon and Theoret were both examined, and denied it. But Ludger Brasseur and J. B. J. Prevost, both of them partisans of the candidate not returned, were brought up, and said they saw Hudon hand Theoret a ticket, and also buy several tickets from the agent. On the other hand, besides Hudon and Theoret as against Brasseur and Prevost, the ticket agent himself is brought up, who positively contradicts both of the last men and witnesses as to Hudon getting several tickets, and Mr. Pharand, who was also present in the office when Hudon got his ticket, swears also that he got only one. Besides this there is the evidence of Dr. Mousseau, Thos. Goodwin, Latour, Joseph Theoret and Jos. Henry, who testify that Hudon got only one ticket, and gave none to Theoret. Mace was recalled by me owing to a misapprehension in the course of the argument of what he was supposed to have said; but he distinctly swore that Hudon got only one ticket that day. The evidence, therefore, is overwhelmingly against the truth of this charge.

It is unnecessary to make any further observation upon the case, except to say generally that the impression made upon me by the evidence is that the election was conducted with scrupulous regard to the law. The petition must be dismissed with costs.

Petition dismissed.

F. D. Monk, for Petitioner.

Ouimet, Cornellier & Lajoie for Respondent.

CIRCUIT COURT.

WATERLOO, July 5, 1878.

Before DUNKIN, J.

WILLIAMS V. SEALE.

Militia service—Allowance for annual drill.

The Captain of a company of volunteers is not the personal debtor of a private in his company for the payment of the amount allowed such private for his annual drill.

The plaintiff, a volunteer in defendant's company, was allowed by the Government the sum of \$6 for his annual drill. After the receipt of the money from the Government as set forth in the pay roll the defendant notified the plaintiff to come to his office and receive his pay. The plaintiff refused and sued the defendant, alleging that the defendant had promised to pay him, but had kept the money. The point in the pleadings upon which the judgment turned is covered by the *considerants* of the judgment.

PER CURIAM. "Considering that the sum of money sought to be recovered in and by this suit is a sum of money held by the defendant as an officer of militia for payment of militia service, and in respect of his disposal of which he is amenable to militia authority: and that he is not personally debtor thereof to the plaintiff, in such wise as to entitle the plaintiff to sue him therefor as by this suit he assumes to do, doth dismiss plaintiff's action with costs."

Girard & Girard for the plaintiff.

Jno. P. Noyes for the defendant.

THE BAR EXAMINATIONS.

The following is a list of the successful candidates at the Bar examinations, which were held at Three Rivers on Wednesday, Thursday and Friday of the present week:

For Practice.—J. M. Tellier, J. Bouffard, L. A. Lefebvre, C. A. Duclos, J. E. Martin, L. P. Brodeur, J. Beauset, Alex. Falconer, C. S. Campbell, F. S. MacLennan, L. A. Rinfret, J. O. C. Olivier, L. A. Lavallée, L. D. Morin, C. E. Dorion, G. Coffin, N. T. Rielle, C. Bruchesi, G. H. Flourde, A. E. Merrill, John S. Buchan, G. Marchand, J. Leonard, E. E. Mallette, E. G. Paré, L. N. Bernard, and F. A. McCord, equal; F. Hague, A. A. Adam and A. E. Beckett, equal; S. Sylvestre, C. S. Roy, E. L. Desaulniers, L. Bélanger, A. McConnel, L. E. Charbonnel, G. A. Brooke, J. H. Rogers, L. J. R. Hubert.

For Admission to Study.—A. Beaudry, L. Brunet, A. Taschereau, A. Turgeon, J. A. D. Brodeur, Jas. Mahon, Ludger Alain, E. Fontaine, H. A. Beauregard, E. Taillefer, M. Beauparlant, L. P. Birard, R. L. Murchison, A. P. Bryson, J. Desaulniers, P. O. Lavallée, Alfred Monk, E. Bourgeois, J. D. Guay, P. J. Jolicoeur, L. E. Pélessier. In the examination for admission to study nine candidates failed to obtain the required number of marks.

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EX PARTE ANNOUNCEMENTS.

There is always some satisfaction in finding ourselves sustained by authority, and we are now able to quote the ruling of a learned body like the Supreme Court of Massachusetts in support of the remarks made on p. 9, condemnatory of *ex parte* publications. An action of libel was brought against the *Boston Herald*, for publishing a petition for the disbarment of the plaintiff, Cowley, before hearing. The case was dismissed by the lower court, on the ground that the publication was privileged, but the Supreme Court has set this decision aside. The following is an extract from the judgment in appeal:—"It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. If these are not the only grounds upon which fair reports of judicial proceedings are privileged, all will agree that they are not the least important ones. And it is clear that they have no application whatever to the contents of preliminary written statements of a claim or charge. They do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege further than we feel prepared to carry it, to say that by the easy means of entitling and filing it in a cause a sufficient foundation might be laid for scattering any libel broadcast with impunity, and we waive consideration of the tendency of a publication like the present to create prejudice, and interfere with a fair trial."

DOUTRE v. THE QUEEN.

On the 12th instant judgment was rendered in this case by the Judicial Committee of the Privy Council, affirming the judgment of the Supreme Court of Canada, which affirmed that of the Exchequer Court. The claim of Mr. Doutre against the Dominion Government for services as counsel before the Fisheries Commission is thus sustained. (3 L. N. 297; 4 L. N. 18, 34; 5 L. N. 153.)

JUDICIAL STYLE.

The House of Lords, which characterized our Civil Code as "voluminous" (3 L. N. 369), does not err on the side of brevity in its judicial decisions. The *Albany Law Journal* says: "The only time when we contemplate the capabilities of dynamite with any approval is when we are condemned to read the long, rambling, slipshod, tautological, cumulative opinions of three or four law lords, which are supposed to set the law for Great Britain." The reproach is not undeserved, and might be avoided if their lordships would take the trouble to reduce their opinions to writing, either before or after delivery, as the opinions of a high court of appeal should be.

In connection with this subject we notice that the *American Law Review* does us the honor to print the observations we made at p. 109, but appears to imply that we were commending brevity *per se*. It is unnecessary to say that this is a misapprehension. Brevity is a relative quality: a judgment must be considered in relation to the matter treated. "It is one thing," says Bacon, "to abbreviate by contracting, another by cutting off." We have referred to this subject more fully on other occasions, and if the short paragraph on p. 109 was obscure it would itself be an illustration of a common fault of brevity. We had previously been reading about some judgments of extraordinary prolixity, and our remarks conveyed the impression of the moment. Our contemporary suggests that "it would be well if opinions could be filed *in extenso* for the purpose of satisfying the parties, and afterwards rewritten and condensed for the purpose of publication." This, of course, is not possible under ordinary circumstances, and judges

must be left to aim at the golden mean between incompleteness and redundancy. It must be admitted that the written opinions of the United States judiciary are not commonly chargeable with either fault.

THE ENO CASE.

Mr. Justice Caron has given judgment, as was expected, adversely to the extradition of Eno. This person's operations were conducted on a gigantic scale, but his crime no more fell within the Ashburton Treaty than those of hundreds whose depredations were less important, and who have found a safe refuge on this side of the line. The learned judge had no difficulty in deciding that Eno was not guilty of forgery within the scope of the Treaty, and the prisoner was therefore set at liberty.

On the subject of extradition the N. Y. *Evening Post* has the following remarks:—

"The difficulty with the reformation of the law hitherto has been a curious one. We have a better treaty with every leading continental power, notwithstanding the difference of race, language, and religion, than we have with England. And why? Chiefly because international distrust and suspicion have been repeatedly aroused by attempts at sharp practice in the extradition of criminals and in the construction of the treaty. In this we have been chiefly to blame. There was no excuse for an attempt made in Gen. Grant's time to establish the extraordinary doctrine that a fugitive might be extradited for one crime and then tried for another, and the result of this—the passage of the English extradition act of 1870, forbidding the surrender of criminals unless a pledge was given that they should be tried only for the extradition crime—was simply a proof of the international distrust excited by our behaviour. The fourteen years which have elapsed since the passage of that act has been a period rich in the production of enlightened extradition treaties, covering various sorts of breaches of trust, with countries far less advanced than England. With the republics of Salvador, of Nicaragua and Peru, with the Orange Free State, Ecuador, Belgium, Spain, and even Turkey—few of them countries likely to be attractive as

an asylum for American swindlers—we have had no difficulty in making treaties which cover other pecuniary crimes than forgery; and in all the European treaties a clause forbidding the trial of the person surrendered for any crime committed prior to that for which he is given up is to be found—a fact which shows that we have abandoned the very point which led to the passage of the hostile Extradition Act by England. The passage of the Extradition Act, however, was resented by General Grant's administration as an indication of a distrust on the part of England of our good faith, and it almost led to a stoppage of all extradition proceedings under the treaty. Fourteen years have elapsed, and a new attempt to evade the provisions of the treaty has been made from our side of the border, and once more it has been demonstrated that our extradition treaty sets a premium upon crime."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 31, 1884.

Before DORION, C. J., MONK, CROSS, BABY, JJ.

LEFEBVRE (defendant below) Appellant, and
THE HOCHELAGA MUTUAL FIRE INS. CO.
(plaintiff below) Respondent.

Mutual Insurance Company—Cash Premium System—Extra Assessment.

Held:—Confirming the judgment of the Superior Court, Montreal, (reported in 6 L. N. p. 236), That a person insured for a cash premium under S. 35 of 40 Vict., ch. 72, is a member of a mutual insurance company and liable as such for an extra assessment, not exceeding \$2 on every \$400 of his insurance, for each loss that occurs while he is such member, provided the deposit notes are insufficient to pay such losses. *Held*, also (reforming in this respect the judgment of the Superior Court), That although fees due appellant as Director could not be set up in compensation against such extra assessments, yet as the company and liquidators had agreed to allow such fees in reduction thereof, the appellant ought not to be condemned for more than respondents had agreed to accept.

The important point decided in this case, was whether a person insured on what was called the cash or stock plan under Sec. 35 of 40 Vict. chap. 72, was liable for extra assessments under Sec. 24 of C. S. L. C. c. 68.

The appellant in his factum urged that his cash premium was final. That the power to take cash premiums was inconsistent with the mutual principle and characteristic of the stock plan. He cited in support, *Flanders on Insurance*, p. 17, and judgments of Hon. Justices Gill and Loranger. He also cited the evidence of Mr. Grant, the Manager, and of Fitzgerald, the Secretary of the Company, to show that by general understanding no such extra liability existed. "Personne," said appellant, "ne songeait, disent MM. Grant et Fitzgerald, à cette répartition extraordinaire de \$2 par \$400 assurés, dont il n'a été question pour la première fois qu'après la mise de la compagnie en liquidation. Personne ne songeait même qu'il y eût une telle disposition dans la loi."

The appellant also invoked the fact that a special form of policy was printed for these cash cases, and also a By-law of the company declaring that the liability of persons insured was limited to the amount of their deposit notes. Also, that in no case could more than one extra assessment of \$2 on every \$400 insured be made under Sec. 24 of chap. 68 C. S. L. C., and that the circumstances did not even justify this one.

The respondent replied, that appellant was a member of a mutual company and as such liable as other members for the extra assessments; that the By-law invoked was contrary to the Statute and void; that members could not avoid their liability by showing that they or those connected with the company considered it different from what the law imposed. That unless an extra assessment for each fire was intended by Sec. 24 of chap. 68 C. S. L. C., there would be no one insured and no company after the first extra assessment had been made. That the six fires on each of which an extra assessment was demanded from appellant, could not be paid otherwise than by extra assessments. The appellant cited 40 Vict., chap. 72, Sec. 1, 3, 6, 7, 8, 38; *May on Insurance*, Sec. 146 and 548; *Brica, Ultra Vires* pp. 7, 38, 598, 745, 746;

1 L. N. 450; *Thompson, Liability of Shareholders*, p. 170 and par. 386.

The judgment of the Court of Appeal maintained respondent's claim for extra assessments and is as follows:—

"The Court, etc.

"Considering that under section 24 of chap. 68 of the Consolidated Statutes of Lower Canada, each member of a mutual insurance company incorporated under the provisions of the said Act is liable, in addition to the amount of the deposit note made by him, to pay a sum not exceeding \$2 on every \$400 for which he is insured, to meet the loss occasioned by fire at the same time, if the amount of the deposit notes be insufficient to pay such loss; and also a sum not exceeding \$2 on every \$400 for which he is insured for any loss occasioned by any one fire occurring after the amount of the deposit notes has been exhausted;

"And considering that by the Act 40 Victoria, chap. 72, sect. 35 (Quebec), the company respondent was authorized to collect from its members premiums in cash for insurances for terms not exceeding one year in lieu of deposit notes, the rights and liabilities of such members remaining in other respects the same as those of other members of the company;

"And considering that it appears by the evidence in this cause, that the appellant was insured in the said company under policy No. 386 for \$1,100, under policy No. 504 for \$4,000, and under policy 918 for \$1,500, periods not exceeding one year;

"And considering that the cash premiums by him paid on the said policy, and the deposit notes of the other members of the company have been exhausted by previous losses, and that the appellant has become liable to an assessment not exceeding \$2 on every \$400 of the amount of his said policies, for the losses which have occurred by each fire pending the said policies, and that the sums for which the appellant should have been so assessed amount to \$125.18;

"And considering that the appellant is entitled to a sum of \$81.25 for services as a director of the company, which sum the directors and the liquidators of the company have agreed to deduct from the amount due by the said appellant;

"And considering that deducting from the sum of \$139.70 for which judgment was rendered by the Court below, the said sum of \$81.25, and the further sum of \$14.52 for which the respondent has filed a *désistement* since this appeal has been instituted, there remains a balance of \$43.93 which is still due by the said appellant to the said company respondent;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 5th of July, 1883;

"This Court doth reform the said judgment, and proceeding to render the judgment which should have been rendered, doth condemn the said appellant to pay to the respondent the said sum of \$43.93, with interest at the rate of seven per cent from the 6th of April, 1881, and costs of suit as in a case in the Circuit Court under \$50, and doth condemn the respondent to pay to the appellant the costs of the present appeal."

Judgment reformed. *

Pagnuelo & St. Jean for the appellant.

Trenholme, Taylor & Dickson for the respondent.

* The right of the company to impose an extra assessment under s. 24 of chap. 98 C.S.L.C. for each fire in cases of insurance on the deposit note system was also maintained in appeal by the judgments in two other cases rendered the same day, viz., that of *McMillan & Hochelaga Insurance Company*, and of *Craig & Hochelaga Insurance Company*, in face of same proof as to existence of the by-laws, etc.

SUPERIOR COURT.

MONTREAL, June 30, 1884.

Before LORANGER, J.

McGIBBON et al. v. BRAND, and DEURY et al., T. S.

Bet—C.C. 1928—Horse Race.

A judgment creditor has the right to seize in the hands of third parties the amount of bets which they have lost to the defendant on a horse race, and which they are ready and willing to pay.

The plaintiffs were judgment creditors of R. H. Brand. Brand made certain bets with the garnishees on the result of the English Epsom Derby, which he won. The plaintiffs attached the amounts so due, and the garnishees declared in Court that they owed the money and intended to pay the bets.

R. D. McGibbon, for plaintiffs, inscribed for judgment on the declaration of the garnishees.

N. Driscoll, for defendant, submitted that in virtue of C.C. 1927 the Court could not give judgment.

PER CURIAM. "Considérant qu'aux termes de l'article 1928 C.C. le déni d'action pour le recouvrement de deniers réclamés en vertu d'un pari, est sujet à l'exception à l'égard des courses à cheval ou à pied et autres jeux licites qui tiennent à l'adresse et à l'exercice du corps; que le contrat intervenu entre les tiers-saisis et le défendeur n'est point illégal et peut faire l'objet d'une action en justice;

"Considérant que les tiers-saisis reconnaissent la validité du dit contrat et se déclarent prêts à payer au défendeur le montant du pari qu'ils ont fait avec lui;

"Déclare l'arrêt ainsi pratiqué bon et valable," etc.

Judgment for plaintiffs.

Girouard & McGibbon for plaintiffs.

N. Driscoll for defendant.

POLICE COURT.

MONTREAL, July 3, 1884.

Before DUGAS, Police Magistrate.

REGINA v. ALEXANDER BUNTIN.

Banking Act—Director of Bank giving himself an undue preference.

Police Magistrate Dugas, in giving his decision in the case of Mr. Alexander Buntin, charged with illegally drawing the sum of \$10,000 from the Exchange Bank, of which he was a director, after its suspension, and of conspiracy with the late president to obtain an undue preference, made the following observations:—

The present prosecution is taken under the Banks and Banking Act of 34 Vict, chap. 5, sec. 61, which reads as follows:—"If any president, vice-president, director, principal partner *en commandite*, manager, cashier, or other officer of the bank wilfully gives, or concurs in giving any creditor of the bank any fraudulent, undue or unfair preference over other creditors, by giving security to such creditor, or by chang-

ing the nature of his claim, or otherwise howsoever, he shall be guilty of misdemeanour, and shall further be responsible for all damages sustained by any party by such preference." The prosecutor, Mr. Adolphe Davis *alias* David, railway superintendent, alleges and proves: that on the 15th day of September, 1883, and for a long time previous, he was, as still he is, a creditor of the Exchange Bank of Canada, in the sum of \$17,767.14, being the amount standing to his credit as a depositor in the said bank; that on that day the said bank suspended payment by a resolution of the board of its directors reading as follows: "Present, A. W. Ogilvie, A. Buntin, H. Bulmer and T. Craig.

"On account of the numerous demands made on the bank for deposits, and the low state of the finances, that is the ready funds, and the inability of stemming the steady withdrawals, it was decided to suspend payment on Monday, the 17th September instant, and to give formal notice of the same to the banks.

(Signed)

"A. W. OGILVIE,
"Vice-President."

It is further proven that since the 8th day of February, 1882, to the 5th day of December, 1883, Mr. Alexander Buntin, the accused, was one of the directors of the said bank, and acted as such; that at the date of the suspension of payment by the said bank, the said Alexander Buntin was a creditor thereof in the sum of \$13,796.36, being the amount standing to his credit as a depositor in the said bank; that on the 18th day of the said month of September the said Alexander Buntin made his cheque or order to the amount of \$8,000 upon the said bank, and presented the same on the day following at the counter of the said bank, when upon the order of the then president of the said bank, T. Craig, he received \$3,000 in specie, paid out of the ready cash of the said bank, and a cheque signed by said T. Craig, as president thereof, for the sum of \$5,000, upon the Quebec Bank, where, since its suspension, the said Exchange Bank had a standing account in deposits; that on the 28th day of the said month of September the said Alexander Buntin was paid in a further sum of \$2,000 out of the funds of the said bank, by receiving

another cheque signed by the said T. Craig as such president, upon the said Quebec Bank, which two cheques were duly cashed by this last bank.

It is also established that the said bank did in fact become insolvent, under the terms of the law, and commenced to wind up on the 15th day of December, 1883, that is, ninety days after it had suspended payment. At this last date the amounts deposited in the said Exchange Bank represented in the aggregate over one million of dollars. From the date of the suspension of payment to the date of the commencement of the winding up, about \$100,000 was paid to depositors. Mr. Rogers, the then paying teller of the bank, says that on the 19th day of September the bank was not paying the cheques of its depositors, and had not paid any unless ordered specially by the president, Mr. Craig. He was told, he says, to pay Mr. Buntin's cheque of \$8,000 by Mr. Craig.

At that time the funds of the bank were not even sufficient to redeem its circulation as it was presented, but could only redeem small amounts.

These are in short the uncontradicted facts elicited from the witnesses of the prosecution, and upon which it is averred that Mr. Alexander Buntin, then being a director of the said Exchange Bank, did on the 19th and 28th days of September last (1883), concur with the then president of the bank, T. Craig, in giving to one of his creditors, that is to say to himself, an undue and unfair preference over the other creditors of the bank.

By the cross-examination of the witnesses the defence has established: that at the time of the suspension of payment the employees of the bank thought generally that it would meet all its liabilities, as by a statement made at that time it showed a surplus of about \$19,000; that Mr. Buntin himself was so confident of the solvency of the bank that even after suspension he ordered his broker to buy some of its stock in addition to the large number of shares he already had; that even after suspension the stock of the bank was fairly rated; lastly, that he refunded the \$10,000 after having been sued by the liquidators to recover that amount, all of which acts were adduced to establish a presumption

tion of good faith on the part of Mr. Buntin at the time he was so paid. I may here say that I do not believe that it is within the scope of the magistrate presiding at a preliminary investigation to take into consideration the more or less good faith which the perpetrator of an offence may be presumed to have had at the time he committed it. Those are facts for the jury to appreciate, as it is for the judge, passing sentence, to consider any other act of a guilty party which may tend to mitigate his offence,—as in this instance, for example, the refunding of the money. I have permitted this proof to be made, as it establishes facts to a certain extent connected with the case, and on account of the large latitude which is always given to an accused party to put himself in the best light possible before the courts and the public. But, as I have said, I cannot here enter into the consideration of those facts, the only question for me being to find whether section 61 of the act above stated has been violated.

It has been argued on the part of the defence that the fact of a suspension of payment did not constitute the Exchange Bank insolvent, as according to section 57 of the Banks and Banking Act such a suspension of payment must be continued during 90 days in order to submit it to the operation of the law in that behalf. That therefore, as by sections 134 of the Insolvent Act of 1875 and 75 of the Act concerning insolvent banks, it is declared in about the same terms, that every payment made by a person or company unable to fulfil its engagements, within 30 days next preceding the insolvency, to a person knowing or having probable cause to know such inability to exist is void, etc. From which it is inferred that the payment to Mr. Buntin of his two cheques before the 30 days preceding the insolvency of the bank was legal, and that therefore he cannot be accused of having violated section 61.

If I understand well the spirit of those two sections they do not go further than to make absolutely void payments made under such circumstances. Surely they do not annihilate the general principle founded upon simple justice and equity, which has always given redress against a wrong-doer. That for the

purpose of preventing lawsuits and giving to trade the steadiness it requires, such a limitation should exist in the statutes, this can be easily understood. But the interpretation to be given to those dispositions of the law, which are a derogation to the common law, should be limited to its narrowest sense. And therefore when to the knowledge of insolvency, or to its intimation, are to be added facts which justice, law or equity reprove, I believe that there can be no doubt that the general rule can be still applied.

"Although the period of thirty days before insolvency, etc., is given," says Mr. Wotherpoon in his book on the Insolvent Act of 1875, "in this section as the time in which a payment made by a debtor unable to meet his engagements to a person cognizant thereof, would be void, there can be little doubt that, under the English authorities, *preferential payments* made before that time may be held void as being against the spirit of and a fraud upon the act. It has been held that if a party voluntarily make a payment by which the equal distribution of his property in bankruptcy will be defeated, such payment is a fraudulent preference. (See *Marshall v. Lamb*, 5 Q.B. 115, 7 Jur. 850.) And I believe this is the only true and sound doctrine. It protects all creditors alike and disapproves preferences, more so when it appears that both creditor and debtor did combine together for that purpose.

In this instance, it must be remembered that Mr. Buntin was at the same time a director and creditor of the bank. That as such director he had access to the books and was in a better position than any outsider to know the exact standing of the assets and liabilities of the bank; that it was his duty conjointly with his colleagues to see to its good management; that if he did not know the financial condition of the bank he at all events had been named on the board to know it, and no one but himself would be blamed if he did not take the means therefor. And if it is true as Mr. Campbell, one of the liquidators, mentions, (and there is no reason to say that it is not) that the bank had been insolvent for a long time previous to the 15th of September, he as such director should have had a knowledge of it; if not, he surely had a sufficient

hint of it when conjointly with his co-directors he found himself under the obligation of sustaining a resolution suspending payments generally. That resolution applied to all creditors alike. It did not, and could not, contain exceptions. And the moment it was passed no one concerned in the management of the affairs of the bank had the right to dispose of its funds contrary to its dispositions, that is, to pay withdrawals. It was, therefore, wrong, illegal, and unjust. The doors of the bank were shut to depositors generally, they should have been to Mr. Buntin also as such; and the moment he took advantage of his position as a director of the bank to persuade or influence, as may be fairly presumed, one of its employees to aid him in being paid in whole or in part his claim, and this against the order of the board of which he was a member, and contrary to the right and interests of the rest of the creditors, he committed a wrongful and illegal act, which, coupled with his cognizance of the difficulties of the bank, debarred him of the protection given to ordinary creditors when paid in ordinary circumstances before the thirty days. And this the accused so well understood, that he refunded the \$10,000 by him drawn when sued by the liquidators. Therefore, the pretension that the payment was legal is not sustainable, and cannot be accepted as an argument in favour of the accused.

But even if the payment had been legal the accused would still be attainable by section 61; for let it be remembered this section is only directed against presidents, directors and other functionaries of banks. Because the position of a paid-up or favoured creditor would, perhaps, in some instances, be legal, it does not follow that under that clause the president, director or other functionary of a bank who grants or concurs in giving such a favour is also legal. The section does not mention only fraudulent preferences, but also *undue* and *unfair* ones. Having been invested with great powers, and having in their hands, and to a certain extent, at their discretion the fortunes of citizens who have put their confidence in them, the law wants those functionaries to treat them all alike with the same fairness and justice. In this

case it is proven that depositors representing in the aggregate one million of dollars did not and could not receive a cent since the date of suspension, whilst some more favoured ones including the present accused, received in the aggregate somewhere about \$100,000, by what right and under what authority I fail to see. Is that just, is that fair towards the other creditors? Certainly not. It is such injustices and preferences which section 61 is intended to prevent, by submitting the perpetrators thereof to punishment. The evidence here leaves no doubt as to the fact that Mr. Buntin was paid contrary to the terms of the resolution, in the sum of \$10,000, to the detriment of others who had an equal right, and that he being then a director of the said bank, and having had to obtain the consent of the president of the bank to obtain such payment, he did, on the 19th and 28th days of September, 1883, concur in giving to himself as such creditor an undue and unfair preference over the other creditors of the said bank; wherefore it becomes my duty to order that the said Alexander Buntin stand his trial upon such accusation at the next term of the Court of Queen's Bench.

J. N. Greenshields and *T. Brouseau* for the complainant, *A. Davis*.

Strachan Bethune, Q. C., and *C. A. Geoffrion* for the defendant.

EXECUTIONS IN ENGLAND AND WALES.

A return has recently been prepared and presented to Parliament of the persons who were sentenced to death for murder in England and Wales for the three years ending the 31st Dec., 1883, in continuation of a former return. A perusal of this black list seems to show that the annual number of murders in England and Wales of which the perpetrators are brought to justice, remains at a pretty constant figure, as the number in 1881 was 24; in 1882, 22; in 1883, 23. The list includes the names of Lefroy, Mapleton, Lamson and O'Donnell, with those of less notorious characters, and in only two instances, curiously enough, is the case specified to have been one of infanticide. This is no doubt accounted for by the fact that out of

the sixty-nine convicted, with regard to whom the particulars are here stated, only seven, or a proportion of one in ten, were women. This seems to be an exceptionally small proportion, especially when it is further stated that out of these seven only one was executed. Again, looking at the figures from another point of view, it is rather remarkable how young the criminals in most of these cases were.

In the case of the seven women the average age was only twenty-four and a half, the oldest being thirty-six and the youngest no more than fourteen. The sixty-two men who were convicted averaged only a fraction over thirty-three, the oldest being seventy and the youngest seventeen. To go a little farther into details, three were under twenty, twenty-seven between twenty and thirty, seventeen between thirty and forty, seven between forty and fifty, six between fifty and sixty, one sixty-five and one seventy. From twenty to forty is thus evidently the murderous age, the crime being probably in most cases prompted by heat of temper. The figures may be read as showing either that older men do not give way to criminal instincts so readily as young ones, or else that they are more successful in taking precautions against discovery. Probably some weight is to be ascribed to each of these positions. As the entire return relates to the period during which the present Home Secretary has held office, there is no opportunity of comparing the merciful tendencies of different occupants of that office, but it appears that of the sixty-two male convicts thirty-eight have been executed, seventeen sent to penal servitude for life, and seven removed to Broadmoor. One man who is stated by some misprint to have been both executed and removed to Broadmoor, is classed under the latter heading. No instance of a pardon is recorded, and in only one instance of commutation was the sentence for less than penal servitude for life, the exception being in the case of one female who was let off with ten years. These figures present a striking contrast to those who which would be supplied by a similar return from the kingdom of Italy, where the execution of a soldier for numerous cold-blooded murders has just

been condemned in the strongest language by the extreme press as a thing unheard of—*Law Times*.

STOCK-GAMBLING.

The *Albany Law Journal* says, with emphasis (and as we have a Wall street in Montreal, the quotation is pertinent): "We would gladly see Wall street and all that therein is, sunk in its neighboring Hell-gate. It is never of any benefit to the community, frequently of the greatest detriment. There used to be laws against stock-gambling, but they were repealed in the interest of the gamblers. We make a great fuss about lotteries and gambling saloons, but Wall street is as much worse as it is possible to conceive. Nearly every dollar made there is at the expense of some one else who has nothing to show for it; the country is kept in an uproar, and the citizens are encouraged in the neglect of honest and productive labor. Why not re-enact and enforce the laws against stock-gambling? The best kind of 'put' for these stock-gamblers would be to 'put' them in prison, and thus the community would stand some chance of getting an honest and productive day's work out of them now and then. The dangers of stock-gambling are encroaching on legitimate branches of commerce, and the time is not far distant when there will be 'exchanges' in nearly every article of trade, and the noise of the 'ticker' will suppress the voice of conscience all over the land."

GENERAL NOTES.

The magnetic girl has come into court. The *Weekly Law Bulletin* (Columbus, O.) says: "*Harris v. O'Connell* is the title of a suit brought last week in the Common Pleas Court of Hamilton County, in which \$1,000 is claimed as damages. The plaintiff is the proprietor of the 'Harris Museum' of Cincinnati, and the defendant the manager of Mattie Lee Price, the so-called electro-magnetic girl. The plaintiff claims that he was deceived by the representations of the manager that the girl possessed electro-magnetic qualities."

The will of the late Mr. J. P. Benjamin, Q.C., was proved June 30, the personal estate being sworn at £80,000. It is entirely in the testator's handwriting, and is so clear that there does not seem to be any apprehension of difficulty in connection with it.

The Legal News.

VOL. VII. JULY 26, 1884. No. 30.

THE KENTUCKY TRAGEDY.

Kentucky has furnished a most extraordinary incident of judicial life in a land where it would be flattery to say that the law is duly respected. Judge Reid, of the Superior Court, had rendered a decision against a lawyer named John S. Cornelson. The latter publicly assaulted and 'cowhided' the Judge, and the Judge's wife, it is said, urged her husband to go forth and slay his assailant. The Judge felt keenly that this mode of vindicating his honor was ill-suited to his office. He resisted the promptings of his wife, which were echoed by two-thirds of the community; but in the end, he felt unequal to the burden of his position, and committed suicide. The strangest part of the affair is, that when Judge Reid had been treated as above described, there was no law to reach the offender—that is to say, no one seems to have thought that the matter could be settled by the punishment of the ruffian in the ordinary course of justice. The *Kentucky Law Journal* laments this condition of things. "There seems the oddest disposition in this community," it says, "to leave the settlement of such affairs to the prowess of the individuals concerned. Any appeal to the law for reparation is considered as a confession of weakness. It is true that the indignity to which Judge Reid has been subjected cannot be over-estimated, but for this very reason the magnitude of the offence demands reparation from the law. Yet one will hear it said, the outrage is too great a matter to be left to the law. The sufferer must right himself. The law is not strong enough. His own greater powers are called for. Could there be greater presumption, or a sentiment more characteristic of a barbarous people, where law is weak and individuals strong?" This was written before the suicide, but Judge Reid seems to have imagined that he had been condemned by public opinion because he would not murder his assailant: even his wife lost respect for him, and life under such a cloud became intolerable. The whole affair

is strange, and utterly discreditable. If the trained intellect of a Judge discharging his functions in a Superior Court succumbs to the influence of his surroundings, we need not wonder that tragic occurrences in other classes of society are so frequent.

LAW REFORM IN ENGLAND.

Mr. Justice Manisty does not feel happy under the order of things introduced by the Judicature Acts, and at the opening of the Summer Assizes for the County of Northumberland, July 9, he took occasion to indulge in a long lament over the general uprooting of the good old institutions. The cost of litigation was supposed to be too great, but now, exclaimed the learned Judge, "the cost was simply double what it was." They had done away with two Chief Justices, and had but one chief over the whole fifteen of the Queen's Bench Division. They had two men to do the work of four. "What was the consequence? Judges were but men. They differed often, and then there was one to one. That was the tribunal that was held up as certain to work right. So far did it go that three judges were never to sit together if it could be avoided. What was the result at the present moment? A Court of Appeal burdened with work, with appeals at the rate of four to one. Thus we had the number quadrupled and the cost doubled. That was one of the effects of the Judicature Acts and the grand system by which everything was to go right. They had been experimenting for years, and he could not see that they were getting a bit further forward. He looked forward with very great doubt as to the effect of all those changes;" and so on for more than a newspaper column. The learned Judge wound up by describing the little petty changes and economies as "nibblings at institutions," and he declared that "such nibblings did not seem right according to his way of thinking." Surprise was expressed in some quarters recently because one of our Judges ventured to criticise legislative and executive changes, and it was said that in England this would be considered an impropriety. But here we find an English Judge handling the subject of legislative and executive reforms in anything but a meek and reverent spirit.

NEW PUBLICATIONS.

THE CONSTITUTIONAL POWERS OF PARLIAMENT AND OF THE LOCAL LEGISLATURES under the British North America Act, 1867. By J. Travis, Esq., LL.B., of the New Brunswick Bar.

This is a treatise of 184 pages devoted to one of the most important topics that can engage the attention of a Canadian lawyer. The first thing that attracts notice on opening the work is the author's style. "*Le style c'est l'homme.*" The Earl of Lytton, in a recent *causerie* in the *Fortnightly Review*, has endeavoured—not altogether successfully—to sustain the truth of this saying of Buffon. If it be applicable in the present case the author is certainly not afflicted with diffidence, or distrust of his own judgment, for the impression is strongly conveyed that the world in general, and the judicial bench in particular from the humblest tribunal to the highest, is filled by persons little better than idiots. The author tells us that his work is intended to bring Order out of Chaos (the capitals are not ours), and in the execution of this laudable undertaking he launches his bolts right and left without the slightest respect for persons or dignities. At the outset (p. 1) the Hon. T. J. J. Loranger's pamphlet recently adverted to (p. 147), receives notice as a work abounding in "crude absurdities," "in which the author makes the most ludicrous efforts to 'darken counsel with words without knowledge.'" Then on page 2, the Supreme Court of New Brunswick, since it lost its late Chief Justice (now Sir Wm. J. Ritchie), is referred to as a court not "of any very high authority," and on p. 19, we are further told that the ability of the court left it when the Chief Justice was promoted to the Supreme Court of Canada. On p. 37 we are informed that the same court "does not contain, among its judges a single lawyer possessing anything like thorough scientific legal knowledge," and, in some respects, its decisions are "supremely ridiculous." On page 34, Mr. Loranger (now Mr. Justice Loranger) is bracketed with his brother, the Hon. T. J. J. Loranger, who is charged with appropriating his ideas and language wholesale. On page 35, Mr. Blake's

attempts to deal with sections 91 and 92 of the British North America Act are said to be "as bad as the very weak attempts of Mr. Loranger and of Mr. Justice Wetmore." On p. 100, the Supreme Court of Canada (the Chief Justice excepted) come in for a share of polite attention, their judgments in the case of the *Citizens Insurance Co. v. Parsons*, "fairly overflowing with error." On p. 131, Mr. Justice Mathieu is described, on the strength of a newspaper paragraph about a judgment, as treating the subject "*à la Loranger.*" And lastly, the highest tribunal of all—the Privy Council—is thus referred to *apropos* of the judgments in the cases of *Dobie v. The Temporalities Board* and *Russell v. The Queen*: "It is almost painful (a kind of, as Byron would call it, 'pleasing pain'), in the excessively ridiculous aspect in which their views are presented, to follow them further. Their ignorance (to be perfectly candid and strictly just); actual, stupid, stolid ignorance, of the matter they are examining, when we consider that that is our highest, authoritative, Appellate Court, is positively painful!"

The above are but a very few of the references to courts and individuals with which Mr. Travis' work overflows. So much for the style. Our space will not permit us at present to do more than describe in a general way the contents of the work. The author has analysed and criticized the constitutional cases in the several courts since Confederation. He seems to hold a middle course between the views enunciated by the champions of "provincial autonomy," and those which are espoused by the extreme supporters of the dominant powers of Parliament. Mr. Travis has evidently studied his subject with much care, and his examination of the decided cases, whether his readers agree with his conclusions or not, will be found interesting and valuable. We are disposed to think he is right in a good deal of his criticism, though we deprecate the trenchant style in which he deals with adverse views. The subject is confessedly intricate, and it does not follow that because Mr. Travis sees one side in a very bright light indeed there is nothing to be said on the other. The work (copies of which may be procured from the author at

St John, N.B.) will not make unprofitable reading for the vacation, and we commend it to the attention of the profession.

CODIFICATION IN THE STATE OF NEW YORK.

By Robt. Ludlow Fowler, Albany: Weed, Parsons & Co., printers.

Pamphlets continue to issue from the press on the burning question of codification, and we are afraid we have not even acknowledged all that have reached us. The present treatise was prepared at the suggestion of Mr. Field, and is an answer to Mr. James C. Carter's paper against codification.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

Before DORION, C.J., RAMBAY, TRESEHER, CROSS, and BABY, JJ.

PRATT (plff. below), Appellant, and BERGERE (def. below), Respondent.

Evidence—Aveu—Commencement de preuve.

To an action pro socio, alleging a partnership and asking for an account of the profits, the defendant pleaded that the plaintiff was only an employee, but at the same time he admitted that there was an understanding that he was to have half the profits as salary, and the defendant repeated this when examined as a witness. Then T., a witness, was asked whether he had had any transaction with the parties and whether they acted therein individually or as partners. Held, that the avou of the defendant was indivisible, and did not constitute a commencement de preuve par écrit; and therefore verbal evidence of the partnership was inadmissible.

The plaintiff moved for leave to appeal from the following interlocutory judgment rendered by the Superior Court, Mathieu, J., April 9, 1884, in which the case is fully stated:—

“La cour, parties ouïes sur la motion du défendeur produite le 3 mars dernier, demandant que la décision rendue par son Honneur le juge Doherty, président la cour d'enquête, renvoyant l'objection du défendeur à la preuve testimoniale tentée par le demandeur, soit révisée par cette cour, et à ce que la dite ob-

jection soit maintenue avec dépens, avoir examiné la procédure et délibéré;

“Attendu que le dit demandeur allègue dans sa déclaration que, dans le cours du mois de décembre 1878, le gouvernement de la Province de Québec ayant demandé des soumissions pour le contrat de l'ameublement de l'école normale à Montréal, le demandeur fit des démarches pour l'obtenir et proposât au défendeur de se joindre à lui; qu'ils se mirent en société pour les fins du contrat, le demandeur devant faire l'ouvrage et le défendeur devant fournir les fonds nécessaires pour l'achat des matériaux et les gages des ouvriers, les associés, l'ouvrage terminé, devant se partager les profits nets; que le défendeur a retiré du gouvernement \$18,895.59 sur laquelle il a perçu un profit net d'au moins \$12,000, dont il n'a pas rendu compte au demandeur; et conclut à ce que le défendeur soit condamné à lui rendre un compte à l'amiable si faire se peut, si non en justice, de la société qui a existé entre eux pour ce contrat, si non et faute par le défendeur de ce faire, qu'il soit condamné à payer au demandeur \$8,000 pour tenir lieu du reliquat du dit compte, et qu'en cas de reddition de compte le défendeur soit condamné à payer au demandeur le reliquat qui se trouvera fixé définitivement;

“Attendu que le dit défendeur a plaidé qu'il était faux qu'il ait jamais formé la société alléguée dans la déclaration du demandeur; que le contrat a été pris au nom du défendeur seul et que les travaux y mentionnés furent exécutés par le demandeur sous sa conduite et d'après ses ordres, et que le demandeur n'était que son employé; que sur les représentations du premier ministre de la Province de Québec d'alors, que le défendeur n'était pas un homme de l'art, le défendeur connaissant les aptitudes du demandeur s'assura les services de ce dernier pour l'exécution et la surveillance des ouvrages se rapportant plus particulièrement à l'ébénisterie; que le dit défendeur demanda alors au dit demandeur de vouloir bien lui prêter son concours dans l'exécution du contrat en question et que sur les profits réalisés, si profit il y avait après avoir payé au dit demandeur ce qui serait convenable pour l'indemniser du temps qu'il y mettrait et l'aider

à supporter sa famille, et ce à titre de salaire, il donnerait crédit au dit demandeur de la moitié des dits profits sur les différents montants que le dit demandeur devait au dit défendeur; qu'il ne fut aucunement convenu que le demandeur serait responsable des dettes ou des pertes résultant de ce contrat; que le demandeur accepta la proposition qui lui fut faite par le défendeur et consentit à prêter son concours et son travail au défendeur aux conditions susdites;

"Que durant la confection des ouvrages le défendeur a payé au demandeur une somme de \$400 à titre de salaire, ou plutôt comme avance faite par le défendeur, sans tenir compte des profits ou des pertes qui pourraient résulter; que depuis l'exécution finale du contrat le défendeur a rendu compte au demandeur du coût de ce contrat, et que la balance revenant au demandeur n'était pas suffisante pour payer le défendeur de ce que le demandeur lui devait;

"Attendu que le dit défendeur examiné comme témoin, a d'abord déclaré dans une première séance qu'il n'avait jamais promis au demandeur une part dans les profits du contrat, mais qu'il s'était seulement engagé à le payer généreusement pour son travail en tenant compte des montants que le demandeur lui devait, et que la rémunération qu'il devait accorder au demandeur était laissée complètement à sa discrétion, et qu'il n'avait jamais été question entre eux de part dans les profits; qu'il admet ensuite que le demandeur devait avoir une part dans les profits comme salaire en sa qualité d'employé du défendeur, mais que dans une autre séance le défendeur a déclaré que lorsqu'il a demandé au demandeur de l'aider dans ses ouvrages le demandeur se trouvait en faillite, et que le défendeur n'a jamais dit à personne ce qu'il entendait lui donner de crainte d'être troublé par les créanciers du demandeur, mais que son intention était de lui donner la moitié des profits; que c'était entendu qu'il n'y avait pas de prix d'établi vu qu'il était en faillite, et que le défendeur ne voulait pas être troublé par les créanciers du demandeur, et que cela a été une des raisons pour lesquelles le défendeur n'a pas établi de prix avec le demandeur; que c'était arrangé de telle sorte que si une saisie-arrêt avait été

prise entre les mains du défendeur il aurait juré que le demandeur n'avait aucune part, vu que le défendeur ne savait pas le montant de profit qu'il ferait par ce contrat, et que le demandeur lui devait une somme aussi élevée pour que dans aucun temps le défendeur eût pu faire serment qu'il ne lui devait rien;

"Attendu que la question suivante a été posée par le demandeur au témoin J. Rossaire Thibaudeau:—Avez-vous eu quelque transaction avec les parties en cette cause, savoir le défendeur et le demandeur relativement au contrat entre le gouvernement et le défendeur pour l'ameublement de l'école normale, et les deux parties en cette cause ont-elles fait cette transaction individuellement ou comme associés?;

"Attendu que le dit défendeur a objecté à cette question comme illégale et comme tendant à prouver par témoin des faits qui ne sont pas susceptibles de preuve testimoniale;

"Attendu que par jugement rendu par l'Hon. Juge Doherty à l'enquête le 25 février dernier, la dite question a été permise sous réserve de l'objection;

"Attendu que le dit défendeur a fait motion pour faire réviser la décision de son honneur le juge Doherty, et demandant que l'objection soit maintenue;

"Considérant que le dit demandeur réclame du défendeur un compte de la moitié des profits faits pour l'exécution du contrat susdit et le paiement de cette moitié des dits profits, et allègue, comme cause de l'obligation du défendeur, une société qu'il prétend avoir existé entre eux;

"Considérant que le dit défendeur dans son plaidoyer et dans sa déposition, admet son obligation de rendre compte au demandeur de la moitié des dits profits, et lui fournit même un compte que cette cour n'a pas maintenant à apprécier, mais soutient dans son plaidoyer et dans sa déposition que la cause de son obligation n'est pas celle qui est mentionnée dans la déclaration du demandeur, mais qu'elle résulte d'une convention par laquelle le défendeur aurait contracté cette obligation comme salaire du travail que devait fournir le demandeur dans l'exécution de ce contrat;

"Considérant que par l'article 1243 du Code Civil l'avou ne peut être divisé contre celui qui le fait, et que l'avou du défendeur fait en cette cause ne peut être divisé contre lui;

"Considérant que le demandeur n'ayant pas de commencement de preuve par écrit pour établir qu'il existait une société entre le défendeur et le demandeur, ni les plaidoyers du défendeur ni sa déposition n'étant suffisants pour constituer tel commencement de preuve par écrit, ne peut prouver par témoins qu'il existait une société entre lui le dit demandeur et le défendeur;

"Considérant que sous ces circonstances la question posée au témoin Thibaudéan est illégale;

"A révisé et révisé la décision rendu par son honneur le Juge Doherty, présidant la cour d'enquête le 25me jour de février dernier, permettant la question sous réserve de la dite objection, et a maintenu et maintient l'objection du dit défendeur à la dite question avec dépens distracts," etc.

RAMSEY, J. (diss.) This case comes up on a motion for leave to appeal from an interlocutory judgment setting aside a ruling at *enquête*, by which ruling certain evidence appears to have been admitted under reserve. The effect of the judgment appealed from is to exclude parol testimony, and therefore it is clearly one of those cases in which leave to appeal should be granted, if appellant's pretensions are sustainable on the merits, for the judgment orders the doing of what cannot be remedied (at least fully and conveniently) by the final judgment. We must therefore examine the merits of the question as to the right of the moving party to make parol proof.

The action is *pro socio* and to account for half of the profits of an enterprise.

By the defence the "*contrat auquel il est fait référence dans la dite déclaration*" is recognized, and the defendant goes on to admit he had transactions with plaintiff with respect thereto—that he had advanced him money, and that he had promised to give "*crédit au dit demandeur de la moitié des dits profits sur les différents montants que le dit demandeur devait au dit défendeur*" POUR LES CONSIDÉRATIONS CI-DESSUS MENTIONNÉES," but de-

fendant specially denies that there was a partnership.

The precise question was this: "*Avez-vous eu quelque transaction avec les parties en cette cause, savoir, le demandeur et le défendeur, relativement au contrat entre le gouvernement et le défendeur pour l'ameublement de l'école normale, et les deux parties en cette cause ont-elles fait cette transaction individuellement ou comme associé.*" The Court, reversing the decision of the judge at *enquête*, held that there was no commencement de preuve par écrit, owing to article 1243 C. C., and that this question could not be put. It is conceivable that if the witness had answered it was as "*associé*," on the merits, it might be held not to be proof of a partnership; but how the alternative could be excluded, as a logical operation, I cannot understand.

But there is more in the matter before us than a defective form of question, for if this were all, the plaintiff might perhaps renew the question leaving out the words "*ou comme associé*," and so an appeal might be avoided. But it seems to me that the reason of the judgment is wholly bad, and that therefore it should be questioned at once. It evidently takes for granted that the article 1243 creates an artificial or purely arbitrary restriction of evidence. It does nothing of the kind. It simply states somewhat inartistically a manifestly wise rule for the appreciation of evidence, and one which has always existed under the French law. To that law it has neither taken away nor added a tittle (1). It expresses a truth for the guidance of courts and judges, and its interpretation is to be determined by the limits of that truth. It warns the judge not to concoct a confession, but it is not intended that everything that a party may choose to say must be taken together and be equally believed. So far as I know, the pretention I combat has never been held theoretically by the writers under our law or practised by the courts.

(1) Toullier, (10,336) has remarked that the Code Napoléon had copied Pothier exactly. He says:—L'indivisibilité de l'avou était regardée comme une règle soumise à des exceptions livrées à la prudence des juges. Pothier, No. 799, énonça simplement la règle sans parler des exceptions. Le code l'énonça de la même manière dans l'article 1356. The article has to be interpreted, *Ib.* 336, 2 Carré & Chauveau, 662.

The commonest illustration of divisibility, so-called, is in pleading, where a contract is alleged, and admitted with a plea in avoidance or exception. In that case the burthen of proof is transferred invariably to the defendant.

What the code means by "aveu" and "admission" is confession. (1) If A on interrogatories answers he borrowed from B, but paid him, the confession must be taken as a whole, because judgment could not pass against A on his confession—"nam inanis inutilisque confessio est nisi sit certi confessio." *l. certum ff. de confess. quod est in controversia*. But if he pleads payment he must prove it, otherwise we should get into a violation of the rule that he who alleges must prove—*ei incumbit probatio, qui dicit, non qui negat*. (2) It will be found that what is uppermost in the thoughts of all the writers who treat of the indivisibility of the confession, is the indivisibility of the judicial confession, and principally on interrogatories. Again, there are cases of its divisibility which are left to the prudence of the judge, and to a doctrine which is too well known to require me to do more than allude to it. (3) By entering into it I should add nothing new, and I should fail to convert those who think they have all the law and the prophets when they can exclaim, "I have the article of the code on my side," meaning thereby, that they have got the most superficial doctrine that does not violate grammatical construction. (4)

There has, however, been a question as to whether the rule in *civilibus non scinditur confessio* is applicable to the *commencement de preuve par écrit*. It seems to me that the reasoning which leads to the conclusion that

it is not is irresistible; and had it not been for an allusion by Serpillon (323 C. C.) to the indivisibility of the admission tending to admit proof, I should not have thought it possible to see any common principle. As I have already explained, the doctrine of the indivisibility of a confession is based on a principle of justice, which forbids one's taking the testimony of a man as one's whole evidence and then rejecting a part. The statutory rule that verbal evidence shall not be received without a *commencement de preuve par écrit* is simply to prevent false witnesses fabricating a story (1). All that was necessary either under the French ordinances or under the statute of frauds was something to give reality to the evidence. Here is how Pothier puts it, the evidence is to be "*non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit ou en fait partie*." If this be the law, it will be hard to justify the judgment in this case. However, I find everywhere the same doctrine: "*Les contradictions et demi-aveux, résultants d'une interrogatoire ou de la défense d'une partie, sont aussi un commencement de preuve par écrit*." 1 Pigeau, 268. And Serpillon, C.C. 321, says: "*Un commencement de preuve par écrit, c'est lorsque l'on a un titre par écrit, non de la vérité totale du fait, mais de quelque fait qui y conduit, ou qui en fait partie*." "*On entend par un commencement de preuve par écrit un écrit qui prouve seulement, ou un fait préparatif à la convention, ou une partie de la convention sans prouver l'autre, ou quelque suite de la convention*." Prévost de la Jannes, Pr. de la Juris. 2, p. 407. Under the C. N. art. 1347, there can be no doubt, for it distinctly tells us what a *commencement de preuve* is: "*On appelle ainsi tout acte par écrit qui est émané de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué*." This is not even a new way of stating the old law (2).

Mr. Justice Loranger made this very clear in the case of *Cox & Patton*, and then, curiously enough, dissented. (18 L.C.J. 320). Now the case of *Cox & Patton* amounts to

(1) It was not intended to exclude verbal testimony, but to check its abuses.

(2) Prévost de la Jannes, Pr. de Juris. 2 p. 407. N. Denisart, *éto. commencement de preuve*.

(1) "L'aveu de la partie, que l'on appelle aussi en droit confession," 10 Toullier, 280.

(2) Cujas decides the special point: "*Si reus allegat solutionem probare debet*," 7, c. 874, C.

(3) 10 Toullier, 336, where the whole question, its history and authorities are fully stated.

(4) It is not uninteresting to compare the operation of doctrine on the text of the French ordinances and of the English statute. Lately a school of philosophers has sprung up, both in England and France, who regret the abandonment of the most simple exposition of their statutory evangel. The English innovator is embarrassed by precedent, his French parallel has no such superstitious terror before his eyes.

this—Patton talked of buying Cox's horse. He was told the price, and went to see it, and offered a cheque for the price demanded. He then took the horse away, drove it to Lachine, brought it back to his own stable and returned it lame the next day. His story was that he took it on trial and that he gave the cheque as security. The majority of the Court held that these answers to interrogatories rendered a sale *vraisemblable*, and allowed the introduction of parol testimony. On the evidence, if admissible, there was no doubt of the sale, and there was no attempt to avoid it.

There is another view of this case which was scarcely touched upon at the argument, but which appears to me conclusive, apart from the question of evidence under the French law, as to the mover's right to have leave to appeal. The matter is commercial, and under the English laws of evidence there could be no doubt the plaintiff could prove his claim (1206 C. C.)

DORION, C. J., remarked that there were two questions which were not to be confounded—the divisibility of the *aveu* and the *commencement de preuve par écrit*. The Article of the Code (1243) says the admission cannot be divided whether extra judicial or judicial. That had nothing to do with the question of *commencement de preuve*. A *commencement de preuve* is incomplete evidence which you may complete by verbal testimony. In the case of an *aveu* the indivisibility exists whether it would make complete proof or whether it would make a beginning only. The point came up clearly in the case of *Fulton & McNamee* (1) which went to the Supreme Court and was there confirmed. The answer is divisible when the facts are not connected, when the answer is contradictory of the pleas, or when there are contradictions in the answer. These exceptions do not apply in this case, and we say the evidence was properly excluded.

Motion for leave to appeal rejected.

Laflamme, Huntington, Laflamme & Richard for appellants.

Geoffrion, Rinfret & Dorion, for respondent.

SUPERIOR COURT.

MONTREAL, July 5, 1884.

MULDOON et al. v. DUNNE et al.

Action of account—Costs.

The rendering of an account à l'amiable which has not been accepted does not relieve a rendant compte from the obligation of rendering an account en justice, but the defendant will not be condemned to pay costs.

The facts and circumstances of the case will be found sufficiently explained in the judgment which follows.

The defendants pretended that it was not true either in fact or in law that they had refused to render an account, as alleged in the declaration. They had in fact rendered their account in due form, and the action should have been *en débats de compte* or *en réformation*;—*Trudelle v. Roy*, 4 L. C. Rep. 222, and *Cummings & Taylor*, 4 L. C. Jur. 304. Under any circumstances the plaintiffs should not have asked that the defendants should be condemned to pay costs, and they had the right to contest the action to that extent.

The plaintiffs on the other hand claimed that the action *en débats* had no existence and was something unheard of. The action *en réformation* only applied where the account rendered had been accepted. The plaintiffs were entitled to sue for an account with the view that such disputed points as had arisen might be decided by the court, a result which otherwise it would never be possible to reach; *Dalloz*, Jur. Gén. Vo. Compte, Sec. 2, Nos. 31, 35 and 36. As to the costs the defendants should pay them, since they have asked the dismissal of an action which was in every way legal and regular; instead of at once admitting that they were bound to render their account in court. Had they done this they no doubt might have asked that the costs of the action should be reserved, until it should appear upon the discussion of the account itself, which of the two parties to the dispute was really in the wrong; or they might possibly have pleaded as in *Trudelle & Roy*, 4 L. C. Rep. 222,—with the view that should it turn out upon the *débats de compte* that the defendants had always been in the right, the plaintiffs should be condemned to

(1) 2 S. C. R. 470.

pay not only the costs of the contested account, but the costs of the action itself which asked for the rendering of an account. But in the present case the account tendered by the defendants does not come up to the date of the action, there being a period of four months administration which has never been accounted for at all; which was not the case in *Trudelle & Roy*; in the second place the amount which appears by the defendants' own account to be due has neither been paid nor duly tendered to the plaintiffs, as in *Trudelle & Roy*, and finally the account tendered in the latter case was in every way regular on its face, whereas here it is not. As to the plaintiffs' right to ask for costs, that right in a case where the account has been duly tendered and is entirely regular in point of form—and the entire dispute is as to the correctness of the account—should depend on the result. If the items disputed were properly disputed and made the defendants the debtors of the plaintiffs, why should not the costs of an action which the defendants rendered necessary, be paid by them, as well as the costs of the contestation of the account? Take the converse case: The *ayant compte* sues for his discharge praying that he may be allowed to render his account in due form in court, with the view that the defendants may be bound to admit it or contest it. Suppose that the account, having been contested, is found by the court to be correct, would not the plaintiff be entitled as well to the costs of his action as to the costs of the contestation of his account?

The following is the judgment:—

“La cour, après avoir entendu les parties par leurs avocats sur le mérite de cette cause, et examiné la procédure, les pièces produites et la preuve, et délibéré;

“Considérant que les défendeurs James Dunne et Patrick J. Durack en leur qualité d'exécuteurs-testamentaires de feu Patrick Muldoon ont, le 26 mai 1883, été requis par les demandereses représentées par Edmund Barnard, avocat et procureur de la Reine, de fournir un compte à l'amiable de leur administration comme exécuteurs-testamentaires de feu Patrick Muldoon, et qu'ils ont acquiescé à cette demande et produit un compte au dit

Edmund Barnard représentant les demandereses;

“Considérant que ce compte requis et fourni comme susdit n'a pas été accepté par les demandereses;

“Considérant que lorsque les parties ne peuvent convenir de rendre le compte à l'amiable, il y est procédé en justice, et que les demandereses n'étant pas satisfaites du compte que leur rendait les défendeurs, pouvaient demander cette reddition de compte en justice aux frais et dépens des dites demandereses;

“Considérant que les défendeurs sont mal fondés en demandant le renvoi de l'action des demandereses qui est bien fondée quant à la demande pour un compte en justice;

“Considérant cependant que les demandereses, vu les dispositions des défendeurs à rendre un compte à l'amiable, ne pouvaient demander contre ces derniers des dépens comme elles l'ont fait dans leur déclaration, si ce n'est en cas de contestation, et que la contestation des dits défendeurs quant à la demande des dépens est bien fondée;

“Considérant que les défendeurs ont fourni avec leur plaidoyer un compte qui paraît régulier dans sa forme;

“A maintenu et maintient l'action des dites demandereses quant à la reddition de compte, et a déclaré et déclare que les dits défendeurs lors de l'institution de la dite action étaient tenus de rendre en justice un compte tel que demandé par les dites demandereses et comme les défendeurs l'ont fait d'ailleurs, a donné et donne acte aux dits défendeurs de la production qu'ils font du dit compte qui pourra être débattu suivant la loi, chaque partie payant ses frais sur la dite action, les frais de reddition de compte devant être à la charge des demandereses.”

Barnard & Barnard for the plaintiffs.

Curran & Grenier for the defendants.

(S.B.)

REPORTER'S NOTE.—*Vide Woods et ux. v. Wilson*, 27 L. C. Jur., p. 149, where the Court of Review reversed a judgment which like the above granted *note* to the defendants of the production of the account, and condemned the defendants purely and simply to render their account in due course within 30 days. This seems to rest on the ground that upon the action the only issue is whether the defendants are or are not liable to render an account. To give *acte* of the production of the account is to pass upon its regularity in point of form which it seems cannot be done at this stage. But in *Woods et ux. v. Wilson*, a difficulty also arose as to the costs, the majority, *Torrance and Rainville, JJ.*, holding that each party to the action should pay his own costs, while *Johnson, J.*, held that all the costs should fall on the plaintiff. The case of *Woods et ux. v. Wilson* and the above, however, appear to be entirely different, so far as the equities are concerned. It would, it seems, be an advantage if the conditions which entitle the plaintiff to his costs of action were exactly defined by a higher court.

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THE QUEEN v. DOUTRE.

We publish this week the text of the decision of the Privy Council in this important case. The *Law Journal* (London) has the following remarks:—"In the appeal of *Regina v. Doutre* the Judicial Committee of the Privy Council decide some interesting professional questions. It is laid down that when a client retains counsel for professional services, he retains him according to the custom and law of the bar of which he is a member. For instance, if an Englishman happened to meet an English barrister or solicitor in Paris, and retained him to conduct his case in a French Court, the rights of the parties would be governed by English and not French law, the place of the contract and the place of the services rendered being irrelevant. Secondly, the Committee entertain 'serious doubts' whether in British Colonies in which the English common law prevails, the fee for advocacy due to a practitioner who is both barrister and solicitor can be considered an honorarium. It would have been as well if the Committee had been more positive on a subject which scarcely admits of doubt. The theory of honorarium belongs not to the service rendered, but to the person rendering it. As soon as that person can recover at all for professional services, he can recover for all professional services. It has never been questioned that solicitors can recover in this country for advocacy in the County Courts, or any other Court in which they have co-audience with barristers. Thirdly, the Committee decide that the rights of the Canadian lawyer against the Crown are the same as his rights against private clients, as to which it need only be said that it would be very strange if it were not so. In reading the formal judgment of the Committee, which in style and manner is half-way between the recitals of a French judgment or the note to a Scotch interlocutor and the judgment of an ordinary English Court of law, whether at home or abroad,

one is struck with the loss sustained by the prohibition of *seriatim* opinions. On a subject of so much interest the judgments in the Court of Appeal and the House of Lords would have been doubly interesting."

EX PARTE ANNOUNCEMENTS.

A letter in a daily paper affords an illustration of the way in which *ex parte* announcements work. We know nothing of the merits of the case, but we take the following as a sample of a very numerous class of proceedings. There was an announcement in the papers about an action for \$100,000 damages. The writer of the letter referred to says:—"The fact that the same has been made public for several days, and as yet no writ has been served on those supposed to be most interested therein, has, to say the least, a very peculiar look about it." We have it from several informants that in many of these cases no writ is ever served. If the announcement in the papers fails to effect its purpose the case is dropped.

THE SALVATION ARMY IN CANADA.

We noted some time ago a decision in England (5 L.N. 265) by which the Salvation Army were permitted to pursue their conquests undeterred by the fear of the police. In Ontario, the police magistrates took a different view (6 L.N. 233), but on appeal to a higher tribunal the verdict is in favour of unimpeded action. In Toronto, July 24, judgment was given at Osgoode Hall by Mr. Justice Rose, on an application to quash the conviction against Bella Nunn, of the Salvation Army, for beating a drum in the streets of London. The judgment was a lengthy one, and, after referring to technical objections and the arguments of counsel, it went on to say: "In my opinion, if the beating of drums be an unusual noise or calculated to disturb, it may be prevented; otherwise not. It follows, if I am correct, that evidence must be given, and, if given for the crown, must be given for the prisoner. In this case evidence was refused on behalf of the prisoner. I am therefore of opinion that the conviction and commitment disclose no offence, that the by-law, so far as it seeks to prohibit the beating of drums simply,

without evidence of the noise being unusual or calculated to disturb, is *ultra vires* and invalid, and that as evidence must be given it must also be received on the prisoner's behalf. The evidence does not, so far as it goes, show that the noise is unusual. It is quite the other way. The evidence does not even state that there was a beating of drums; it was playing a drum. Am I judicially to know that beating a drum and playing a drum are the same? The order must go for the prisoner's discharge."

CHEAP PHILANTHROPY.

County Courts, whether in Canada or in England, are somewhat doubtful authority on the law. *Est ubi peccat*. We imagine that one of the slips is in a case noted in the columns of our contemporary the *Law Journal* (London). The person who has the honour of setting the ball of benevolence in motion should undoubtedly have the privilege of paying (and if he does not consider it a privilege, then it should be a legal obligation upon him). The *Law Journal* says: "The well-known humanity of the medical profession is put to a further test by a decision of the County Court judge at Exeter on Wednesday last. On a certain Sunday in May one of the congregation at a church in Exeter was taken suddenly ill. The Mayor, who was present, immediately sent a boy for a doctor. The doctor arrived, and having ministered to the patient's wants, sent in his bill for the modest sum of five shillings to the Mayor. The Mayor declined to pay, but suggested that if the patient did not settle the bill it should be sent in to the watch committee. This seemed to imply that the Mayor's benevolence was in his corporate and not his individual character, and the doctor, declining to take the suggestion, put the Mayor in the County Court. The County Court judge, however, held that 'merely sending for the nearest medical man is no contract.' This view, if sound, will encourage the practice of much cheap and ostentatious benevolence, and on hot Sundays the doctor who lives near the church will probably spend half his time running to and fro to cut the laces of young ladies who find it convenient to faint during the

sermon. But why should this new maxim of English law apply to the nearest doctor only. 'Work and labour done at the defendant's request,' is a very ancient cause of action which might be supposed to extend to doctors. If a philanthropist finds a person disabled in the street and sends him home in a cab, he must pay the cabman. The good reputation of doctors for self-sacrifice is, however, as little to their worldly advantage as the bad name which may be given to a dog. The 'nearest doctor,' is so convenient and ready an institution, that people are apt to look upon him as a public servant, bound to respond gratuitously to the call of every one in need."

NOTES OF CASES.

PRIVY COUNCIL.

LONDON, July 12, 1884.

THE QUEEN V. DOUTRE.

Action for Professional Services—Locus contractus—Status of advocate—Action against the Crown.

An advocate of the Province of Quebec, being by law and the custom of his profession entitled to recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, expressed or implied, be held to have employed him upon the usual terms according to which such services are rendered. The contract is not dependent upon the law of the place where the services are to be given, but upon the status of the person employed.

A Quebec advocate has the same right to fees against the Crown as in other cases.

PER CURIAM. On the 1st of October, 1875, the Government of Canada addressed and sent to the respondent, Mr. Joseph Doutre, a letter, signed by Mr. Bernard, the Deputy Minister of Justice, in the following terms:—

"Sir,—The Minister of Justice desires me to state that, the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at Halifax under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel, in conjunction with Messrs. Samuel R. Thompson, Q.C., of St. John, New Brunswick,

and Robert L. Weatherbee, barrister, of Halifax. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject."

Upon receipt of this letter the respondent wrote in reply that he would act as requested. The respondent is a member of the Montreal section of a body of legal practitioners incorporated by cap. 72 of the Consolidated Statutes of Lower Canada, under the title of "the Bar of Lower Canada." By the terms of the statute each member of the Bar is admitted to practise as "advocate, barrister, attorney, solicitor, and proctor at law," and no person except a member of the Bar duly admitted is entitled to conduct business in any of these capacities before the Courts of Lower Canada. Every member of the Bar must be registered in the district where he intends to practise, and he becomes answerable for his conduct to the council of that district, being liable, in case of his offending against professional rule or etiquette, to censure or to suspension from office for any period not exceeding a twelve month. It is not matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit* in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar. But it is asserted for the appellant that by the law of Ontario, the Province in which Ottawa, the seat of Government, is situated, a counsel cannot sue for his fees, and that he is under the same disability according to the law of Nova Scotia, where, according to Article 23 of the treaty, the Commission was to meet. In support of that contention, counsel for the appellant referred to the opinion of Chief Justice Harrison in *M'Dougall v. Campbell* (41 U.C.Q.B., 332) as correctly expressing the law of Ontario, but they mainly relied upon the proposition that in those provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees nor make a valid agreement as to their remuneration,

unless that right has been conferred upon them by statute.

In these circumstances it was maintained that the right of the respondent to sue for his fees must depend either upon the law of Ottawa, the *locus contractus*, or upon the law of Nova Scotia, the *locus solutionis*, and that in neither case was any suit competent to him. Were it necessary to decide all the points thus taken by the appellant, questions of much nicety would arise. It is by no means clear either that Ottawa was the *locus contractus*, or that Nova Scotia was, in the strict sense, the *locus solutionis*. It is at least a plausible view of the case that the contract was completed in Quebec at the moment of time when the respondent posted his letter accepting the employment offered him by the Minister of Justice. On the other hand, although the Commission was to sit at Halifax, it is perfectly plain that the work expected of the respondent and actually performed by him was by no means confined to advocacy of the Dominion claims during the sitting of the Commission. His employment was not limited to what would in this country be considered the proper duties of a counsel, but embraced the work of an agent or solicitor. In point of fact, he is employed to prepare the case of the Dominion Government as well as to plead in their behalf. That such was the understanding of both parties may be inferred from the known professional *status* of the respondent, as well as from the fact that, in pursuance of the so-called retainer of the 1st of October, 1875, the respondent had papers sent him, and was engaged at Quebec during eighteen months, with occasional visits to Ottawa, in collecting and putting in shape materials for framing and supporting the claim which was to be urged before the commission. Then, as regards the other questions of law raised by the appellant, there is much difficulty. Their lordships are willing to assume that the law of England, so far as it concerns the right of the bar of England to sue or make agreement for payment of their fees, was rightly applied in the case of *Kennedy v. Brown* (13 C.B.N.S., 677), but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Chief Justice

Erle. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the bar alone excepted, can recover their fees by an action at law. But it is unnecessary, in the view which their lordships take of this case, to decide any of these questions which were raised by the argument for the appellant. The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was performed. When any advocate or other skilled practitioner is by law and the custom of his profession entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, expressed or implied, be held to have employed him upon the usual terms according to which such services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration, and it is dependent upon the *status* and rights of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in his professional capacity. A member of the bar in England, in accordance with the law of that country and the rules of the profession to which he belongs, renders, and professes to render, services of a purely honorary character. If in his professional capacity as an English barrister he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country, by whose law counsel practising in its regular courts were permitted to have suits for their fees, that would not give him a right of action for his *honorarium*. His client would have a conclusive defence to

such an action on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that bar are understood to practice. The respondent is a member of the Quebec section of the bar of Lower Canada, and it was in that capacity that he was retained by the government as one of their counsel before the Fisheries Commission. The respondent has the rank of Queen's Counsel conferred upon him by patent, but that circumstance does not appear to their lordships to affect the present case. It gave him a certain precedence in a question with other members of the bar, but it made no change upon the duties and obligations incumbent on him as a practising member of the bar, or upon his privileges as such, including the right to sue for his fees. The retaining letter of the 1st of October, 1875, makes no mention of fees, and their lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the respondent was to be remunerated for his services upon the same terms on which these services were rendered to clients in Quebec. The respondent was engaged and undertook to go to Halifax as a Quebec counsel, subject to the same rule of his bar by which his conduct as a lawyer was regulated in Quebec, and it would be a strange result if, retaining his *status* and performing his work as a member of the Quebec Bar, he was nevertheless to be stripped of the privileges attaching to that *status* as soon as he entered the Province of Nova Scotia. A few weeks after his acceptance of the letter of the 1st of October, 1875, the respondent received a retaining fee of \$1,000, and thereafter the subject of counsel's remuneration does not appear to have been considered until May, 1877, when it was discussed at Ottawa, in the course of one or two personal interviews between Sir A. Smith, Minister of Marine and Fisheries in the government of Canada, and the respondent.

The parties are widely at variance in regard to what actually passed on the occasion of these interviews. The allegation made by the respondent in his petition is:—That on the eve of his leaving his home for Halifax in

May, 1877, your petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement, under which your petitioner should be paid \$1,000 a month for current expenses while in Halifax, leaving the final settlement of fees and expenses to be arranged after the closing of the Commission." On the other hand, it is alleged in the defence filed for the appellant:—"That the arrangement made with the suppliant referred to in his petition, under which he was to be paid \$1,000 a month while in Halifax, was not a temporary and provisional arrangement as alleged, but that the \$1,000 a month, was, with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses." The Commission met at Halifax on the 16th of June, and brought its labours to a close on the 23d of November, 1877, having sat, with occasional adjournments, for a period of five months and seven days. In addition to the retaining fee already mentioned, the respondent received a "refresher" of \$1,000, and also six monthly payments of \$1,000 each during the sitting of the Commission, making a sum total of \$8,000. According to the respondent, these sums were paid to him to account of his remuneration, the precise amount of his fees and expenses being left for adjustment subsequently. According to the appellant, they were paid to and received by the respondent as in full of his whole claim for fees and expenses. Both parties are agreed that in May, 1877, it was arranged, that those sums (to the extent of \$7,000) should be paid to the respondent, but they differ as to the footing upon which they were to be paid. Being of opinion that by the terms of his employment in 1875, the respondent was entitled to a *quantum meruit* in respect of the services which might be required of him, their lordships think that it lies with the appellant to make out that the respondent's original right to remuneration was varied by subsequent agreement, and they have also come to the conclusion that the appellant has failed to establish the existence of such an agreement. The evidence upon this point, which need not be referred to in detail, is very unsatisfactory. It is abundantly plain that the impression honestly

derived by Sir A. Smith from his interviews with the respondent in May, 1877, was that the respondent had agreed to accept a refresher of \$1,000, and a payment of the same amount monthly during the sittings of the Commission, as in full of all claims for remuneration. But in order to alter the then existing rights of the respondent, it is not enough for the appellant to show that such was the impression created in the mind of Sir A. Smith; he must also prove that the terms of the arrangement, as understood by Sir A. Smith, were understood in the same sense and were assented to by the respondent. But the respondent swears distinctly that he understood and believed the arrangement to be provisional merely; that its object was to fix the sums which were to be paid him to account, leaving the balance payable to him for after-adjustment, and there are circumstances proved in the case which seem to establish beyond question that the respondent at the time sincerely entertained that belief. Then the evidence of Mr. Whit-cher, the Commissioner of Fisheries for Canada, and the only third party present at these interviews, is not only very inconclusive, but what he does state, as to the language actually used by the principal parties to the arrangement then made, tends to support the respondent's understanding of its terms. In that state of the evidence, their lordships are unable to hold that the appellant has satisfied the *onus* incumbent on him of proving the new arrangement alleged in his defence. In the courts below, while the learned judges were equally divided as to the result of the case, there was a remarkable diversity of judicial opinion in regard to the law applicable to its decision. The cause was tried before Mr. Justice Fournier, who, on the 12th of January, 1881, gave judgment in favour of the respondent, and fixed the amount of fees and expenses still remaining due to him in remuneration of his services at \$8,000, and it is not maintained that the amount awarded by the learned judge is excessive, if the respondent has a right of action, and that right is not barred by the alleged arrangement of May, 1877. The cause was then taken by appeal before the Supreme Court of Canada, who gave their

judgment on the 13th of May, 1882. Chief Justice Ritchie and Justices Strong and Gwynne were in favour of allowing the appeal, but Mr. Justice Fournier, who was a member of the Full Court, adhered to the view which he had taken as judge of first instance, and Justices Henry and Taschereau, in substance, agreed with him. In consequence of this equal division of opinion in the Supreme Court, the order appealed from was confirmed, and the appeal dismissed, with costs. Their lordships do not consider it necessary to notice the great variety of reasons assigned by the learned judges of the Supreme Court in support of the views which were severally adopted by them, with the exception of one point raised in the judgment of Mr. Justice Gwynne. That point is deserving of notice for this reason—that if the opinion of the learned judge, which is based on the provisions of the Petition of Right Act of Canada, be well founded, the respondent, though he might have suit for recovery of his fees from any subject, could not recover them, by petition, from the Crown. By a pardonable error, Mr. Justice Gwynne refers to the Act of 1875, instead of the Petition of Right Canada Act, 1876 (39 Vict., c. 27), which repealed the statute of the previous year. Section 19, which is identical, in expression, with the similar circumstances of the repealed act, provides “that nothing contained in this act shall give to the subject any remedy against the crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the imperial statute 23 and 24 Vict., c. 34.” The learned judge seems to hold that these provisions place a Quebec lawyer on perfectly the same footing as an English barrister, so far as regards his right to proceed against the Crown for recovery of his fees. But it appears to their lordships that the process of reasoning by which the learned judge arrives at that conclusion confounds two things which are essentially different—“right” and “remedy.” The statute does not say that a Quebec lawyer shall, in all cases, have only the same right against the Crown as a member of the English bar. What it does enact is that no subject in

Canada shall be entitled to the “remedy” provided, unless he has a legal claim, such as could have been enforced by petition of right in England prior to the Imperial Act of the 23rd and 24th Victoria. It is impossible to hold that a member of the Quebec bar who, by law and practice, is permitted to sue for his fees, when he seeks his remedy against the Crown, under the Canadian Act of 1876, has no such legal claim, and that he sues under circumstances similar to those in which an English barrister is placed who, neither by the usage of his profession nor the law of his domicile, can maintain any action for his fees. Their lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the courts below, and to dismiss the appeal, with costs.

Judgment affirmed.

The *Solicitor General* and Mr. *Jeune* for the Crown.

Mr. *McLeod Fullarton* for the respondent.

SUPERIOR COURT.

MONTREAL, July 30, 1884.

[In Chambers.]

Before TORRANCE, J.

McLEMAN, Petitioner, and PHILLIPS et al., Respondents.

Costs—Petition for appointment of sequestrator.

The petitioner in April presented a petition for the appointment of a sequestrator to collect the revenue, of certain lots of land, in which petitioner claimed a usufructuary interest. After pleas filed, the petitioner discontinued, and now claimed the revision of a bill of costs. The bill was taxed against petitioner and a fee of \$25 allowed respondent's attorney. The petitioner contended that the only fee allowable under the tariff was \$3.

Ritchie, supporting the taxation, cited *Wotherspoon*, C. C. P., p. 321, 2, and 3 *Legal News*, p. 358; 17 L. C. Jur. 69.

Benjamin *à contra*.

TORRANCE, J. The taxing officer appears to have been guided by the rules laid down for actions not specially provided for; p. 321 of *Wotherspoon*.

I am inclined to place the taxation of the present proceeding under No. 83 p. 329 of

Wotherspoon. It provides for fees to obtain appointment of tutor, curator or any other such proceeding. The fees to be allowed are therefore \$12 to adverse party on contestation, and \$8 for law issue.

Benjamin for petitioner.

F. Ritchie for respondent.

COURT OF QUEEN'S BENCH.

[Crown Side.]

DISTRICT OF TERREBONNE, July, 1884.

Before JOHNSON, J.

THE QUEEN v. GRANGER.

Criminal Procedure—Indictment for Perjury.

Held, that where the preliminary formalities required by sec. 28, 32-33 Vict. c. 29, concerning criminal procedure, have not been complied with, an indictment for perjury will be quashed if it has not been preferred by the direction in writing of the Attorney-General himself.

In this case the indictment was signed "L. O. Taillon, atty-general, by Chs. de Montigny, Crown prosecutor."

The defendant moved to quash the indictment and his motion was granted.

Chs. de Montigny for the crown.

Wilfred Prevost, counsel.

Arthur Globensky (of Globensky & Poirier) for defendant.

CUMULATIVE SENTENCES.

The Supreme Court of Michigan recently passed upon the question of cumulative sentences in *Bloom's Case*, 19 N. W. Rep. 200. In that case a prisoner, convicted for two separate offences, was sentenced to serve three months for the first, from January 25 to April 24, and for a like term for the second offence, from and after April 24, unless the first term should expire before that time, in in which case the second should begin at the termination of the first. The court held that the second sentence was void, because a sentence to confinement, to take effect in the future, cannot be sustained unless plain and free from contingencies. This does not seem to be in accord with the current of authorities. See *Desty's Crim. L. (Pony Series)*, p. 130. It has heretofore been held

that where a prisoner is convicted of a second or subsequent offence, the judgment may direct that each succeeding period of imprisonment shall commence on the termination of the one immediately preceding, *People v. Forbes*, 22 Cal. 136; *Ex parte Dalton*, 49 Id. 463; *State v. Smith*, 5 Day, 175; *Kite v. Commonwealth*, 11 Met. 581; *Cole v. State*, 5 Eng. 318; *Ex parte Mayers*, 44 Mo. 279; *Ex parte Turner*, 45 Id. 318; *Williams v. State*, 18 Ohio St. 46; *Mills v. Commonwealth*, 1 Har. (Pa) 631; *Commonwealth v. Leath*, 1 Vas. Cas. 151; *Wilkes v. Rex*, 4 Brown Parl. C. 360; *Rex v. Bath*, 1 Leach, 441; *Reg. v. Outbush*, L. R. 2 Q. B. 379. But see *Miller v. Allen*, 11 Ind. 389. Pardon or reversal of the first or preceding sentence on writ of error before expiring of time originally fixed not affecting second or subsequent sentence. *Kite v. Commonwealth*, 11 Met. 581; *Ex parte Roberts*, 9 Nev. 44; *Brown v. Commonwealth*, 4 Rawle, 259. See Opinion of Justices, 13 Gray, 618.—*American Law Journal* (Columbus, O.)

LORD COLERIDGE'S VISIT.

A statement having been made public, that Chief Justice Coleridge was writing a book about America, his lordship writes to the *Albany Law Journal* to say that there is not the slightest foundation for the report. He says: "My visit was too short, too hurried, too pleasant in all ways, to give me any real insight into your wonderful country. There must be by-ways I never saw, unscrupulous people I never met; and if I were foolish enough to try to generalize from such very imperfect materials, I have not the power to do so with effect. I cannot knock off a dissertation on a great country of infinitely complicated elements, and endless variety of social aspects, in half an hour. The incorrigible vanity of such a proceeding would be laughable if it were not sometimes so very mischievous. No; I must be content with the very pleasant memories of my ten weeks' American vision, during all of which I never heard an unkind word, or met an unfriendly person, and which will always warm my heart when I think of it, till it is chilled forever by that which cannot now be very far away."

GENERAL NOTES.

The death is recorded, July 23, of the Right Hon. Sir Lawrence Peel, aged 84. The deceased, who was a cousin of the late Sir Robert Peel, was born in 1799. After filling the post of Advocate General at Calcutta he was raised to the Chief Justiceship of the Supreme Court in 1842, and retired in 1855. In 1871 he was appointed a member of the Judicial Committee of the Privy Council.

The death of Sir Watkin Williams, a judge of the Court of Queen's Bench, is reported by cable July 18. The deceased was born in Llansannan, Wales, in 1828, his father being rector of that place. He first studied for the medical profession, but abandoned it for the bar. He was made a Q.C. in 1873, and was M.P. for Denbigh (liberal) for several years, and in 1880 was appointed a justice of the Queen's Bench division of the Supreme Court of Judicature.

"What is a kiss?" asks the *Pall Mall Gazette*. "The question can only be answered by experience; *colitur oculando*. But it is easy after a decision in the Lambeth County court yesterday to say what a kiss is not. It is not legal 'consideration.' A surgeon in Lambeth kissed a workman's wife; the husband valued the kiss at five pounds, and the surgeon gave an I O U for that amount. A month after date an action was brought on this document, but the judge promptly ruled there was no consideration and gave a verdict for the defendant. Perhaps the lady was in court, and the judge may have been influenced by that. For even the poets admit that there are kisses and kisses! The interesting question is whether yesterday's judgment was meant to lay down a general principle, or whether every case must be decided on its merits."

The Supreme Court of Louisiana lately upheld a verdict in trespass for \$700, rendered against a furniture dealer for unlawfully retaking furniture upon failure to pay for it. Say the court: "The unlawful invasion of the pauper's hovel, and abstraction of its scanty possessions is an injury identical in character and magnitude with the like entry of a palace and the despoiling it of its gorgeous apparel."—*Ohio Law Journal*.

The Supreme Court of Georgia has affirmed a lower court judgment on a verdict of guilty of circulating an indecent pictorial newspaper known as the *National Police Gazette*, in *Montross v. State*, 17 Rep. 783. It seems that the defendant violated the law for the express purpose of making a test case, that he was anxious to vindicate the charges brought against it, and with that view and that he might not fail in his object, he sought the chief of police and bestowed on him copies of his paper. The defendant succeeded apparently beyond his own expectations, for he was sentenced to pay a fine of \$1000, or, in default, to labor for one year on the public works.—*Weekly Law Bulletin*, (Columbus, O.)

The retrospective clause in the French Divorce Act will probably have the effect of keeping lawyers and the law courts busy for some time to come. Couples legally separated for upwards of three years will be

entitled to demand a divorce at once, and the application may be made by either the plaintiff or the defendant in the separation suit. The court will, however, have to review the evidence given in the earlier proceedings, and if the facts should seem not to be of sufficiently grave a nature to warrant a divorce it will be withheld. Such cases will, however, it is believed, prove to be exceedingly rare; separations being rarely asked for or granted on grounds which would not warrant a divorce under the act. It is estimated that not fewer than five or six thousand applications will be made under the retrospective clause.—*St. James Gazette*.

The *New York Times* shows that there are in the city of New York only 15,450 persons liable to jury duty. Of 5,646 members of the produce, cotton, stock and petroleum exchanges less than five per cent. are liable. Seventy thousand escape by not having the property qualification, thirty thousand by physical disability, and twenty thousand by military service. The *Times* remarks that "if jury service is to be handed over to the ignorant, the vicious and dissatisfied, the day will soon come when other cities will be taught the lesson which Cincinnati has learned."

That a holiday is a necessity and not merely a luxury, is a fact, which, says the *British Medical Journal*, it especially behoves members of our hardworking profession to remember in the regulation of their own lives as well as in their dealings with their patients. For the brain-worker, periodical remission of accustomed toil has always been a necessary condition of continued vigor. For him the heightened tension of modern life has especially accentuated the need for occasional periods devoted to the recreation and reaccumulation of energy. The oogen physiological principles and practical purposes of systematic holidays are generally admitted. All workers, if they are to last, must have holidays. For some persons and for some occupations frequent short holidays are the best; with other natures and in other circumstances only comparatively long periods of release from routine are of service. Few real workers, if any, can safely continue to deny themselves at least a yearly holiday. Mere rest, that is, mere cessation from work, while it is better than unbroken toil, does not recreate the fairly vigorous so thoroughly as does a complete change of activity from accustomed channels. For the strong worker, either with brain or muscle, diversion of activity recreates better than rest alone. The whole body feeds as it works, and grows as it feeds. Rest may check expenditure of force, but it is chiefly by expending energy that the stores of energy can be replenished. We mostly need holidays because our ordinary daily life tends to sink into a narrow groove of routine exertion, working and wearing some part of our organism disproportionately, so that its powers of work and its faculty of recuperation are alike worn down. In a well-arranged holiday we do not cease from activity, we only change its channels. With such change we give a new and saving stimulus to assimilation and the transmutation of its products into force. As a rule, the hardest workers live longest, but only those live long who sufficiently break their wonted toil by the recreating variety of well-timed and well-spent holidays.

The Legal News.

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JUDICIAL CHANGES IN ENGLAND.

The vacancy in the Queen's Bench Division caused by the death of Mr. Justice Williams; noticed on p. 248, has been filled by the appointment of Mr. Alfred Wills, Q.C., a counsel who has been engaged in several cases from this city before the Judicial Committee of the Privy Council. The *Law Journal* remarks: "The appointment is accepted on all hands as an admirable choice, the only criticism being that it would have been better if Mr. Wills had been chosen at a date nearer the time when he was President of the Alpine Club." The new Judge was born in 1828, his father being a Birmingham solicitor. He was called to the bar in 1851, obtained 'silk' in 1872, and has held the recordership of Sheffield since 1880.

THE MOUSSEAU INQUIRY.

A question of some interest has arisen in the course of the investigation into the charge made against Mr. Justice Mousseau, and we reproduce the ruling of the Commission in our present issue. The circumstances were these. Mr. Mousseau was Premier of the Province of Quebec at the time when tenders were received for the construction of new legislative buildings. He has since been appointed a Judge of the Superior Court of the Province. During the last session of the Provincial Legislature, Mr. Mercier, leader of the opposition in the Legislative Assembly, preferred a formal charge that Mr. Mousseau while Premier had sold the contract to Mr. Charlebois for a consideration. A committee was appointed to investigate the matter, but as the session was drawing to a close, the members of the committee were appointed a Commission to sit during the recess. The Commission proceeded with their task, and in the course of the examination of witnesses, Mr. Joly, one of the Commissioners, being overruled by a majority of the Commission as to the admissibility of a question which he desired to put to a witness, declared he would

no longer act as a Commissioner, and withdrew. Mr. Robidoux, another member of the Commission, then said that the withdrawal of Mr. Joly broke up the Commission, and he also declined to sit. The question was whether the remaining Commissioners had authority to proceed. They decided in the affirmative, and the reasons are given at length on another page. The decision seems to be almost a dictate of necessity, for otherwise it is apparent that a Commission at the last moment might be rendered futile by the withdrawal of a member who desired to prevent a report.

THE BOUNDARY QUESTION.

The boundary question has been argued during several days before the Judicial Committee of the Privy Council. The Hon. O. Mowat and Mr. Scoble, Q. C., addressed the Committee for Ontario, and Messrs. D. McCarthy, Q. C., and Christopher Robinson, Q. C., for the Dominion and Manitoba. At an early stage of the proceedings the award of the Canadian arbitrators was declared to be *ultra vires*, and the arguments were then directed to the question of the boundary between Ontario and Manitoba. At the conclusion of the arguments the Lord Chancellor said the Committee would make a report to Her Majesty, as usual in cases of this character.

JUDICIAL CRITICS.

We have quoted on page 233 the observations of Mr. Justice Manisty on the changes effected by the Judicature Acts. Another criticism worthy of notice is that of Sir Laurence Peel, a member of the Judicial Committee of the Privy Council, who died July 22. The deceased judge was fond of writing to the *Times*, and just before his death he penned a letter on Law Reform, from which the following is an extract: "What with abortive trials, retrials *decies repetitæ*, motions and appeals, the Nisi Prius Court should have inscribed over it the inscription Dante gives to his Hell. Causes for defamation have largely multiplied, and people are as tenacious of their rights and wrongs as a lady of doubtful virtue. No check whatever is interposed. Let us profit by *Belt v. Lawca*,

We have acted in law reform as a foolish householder acts in a snowstorm, who clears the snow away before his door and leaves an alp of snow on his roof. We have amended practice, pleadings and evidence, and the trial is worse than ever. In our desire to root out errors we aim at the impossible. A certain degree of it is inevitable, and the invalid who is also against taking medicine, dies none the later, and has a nauseous life of it. What, then, must we do? What am I that I should advise all our mighty men? I merely tell them they are dancing in a net." There is a slight incoherence apparent in this effusion, but it is to be remarked that the writer had attained the ripe old age of 85.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, July 14, 1884.

[In Chambers.]

Before PAPINEAU, J.

ROSE et al. v. TANSEY, and THE CITY OF MONTREAL, *mise en cause*.

Charter of City of Montreal—Contestation of election of Alderman—Procedure—Rights of Defendant.

The defendant whose election as alderman for a ward in the City of Montreal is sought to be annulled, has a right to allege and prove that illegal votes were cast for the other candidate, and to claim a scrutiny, and to show that said candidate was guilty of acts which render him ineligible, even where the seat is not claimed for such candidate and he is not a party to the cause.

The petitioners complained of the return of the defendant, Denis Tansey, as the candidate elected by a majority of votes at an election of alderman for St. Ann's Ward in the City of Montreal, held on the 1st of March last, and they prayed that the election be set aside.

The defendant, among other pleas, alleged that he was elected by a large majority of the votes legally cast in the election; that apart from the legal majority declared in his favor, there were cast against him a large number of illegal votes which should be struck off the list, and which being struck off, would leave

the majority declared for the defendant not only intact but would increase it; and that the defendant was entitled to a scrutiny. He also alleged that the defeated candidate, Malone, personally and by his agents, had been guilty of acts of corruption.

The petitioners answered in law to this plea: "1. Parce que les allégués de ce plaidoyer ne peuvent affecter la présente contestation; 2. Parce que le siège n'est pas réclamé par le dit Moses Malone; 3. Parce qu'en conséquence les actes de corruption que lui et ses agents ont pu commettre ne peuvent en aucune manière changer les conclusions de la requête libellée."

The defendant cited the *Tannton* case, O. & H. 187; *South-West Riding* case, O. & H. 215.

The following judgment was rendered by the learned Judge:—

"Après avoir entendu les requérants et le défendeur par leurs avocats respectifs sur la réponse en droit des requérants à la troisième défense du défendeur, et sur la requête des dits requérants, produite le 18 avril 1884, pour faire rejeter la dite troisième défense; avoir examiné la procédure et délibéré;

"Considérant que la procédure indiquée dans la charte de la cité de Montréal (37 Vict., chap. 51, sect. 25), est de la nature d'un *Quo Warranto* et diffère notablement de la procédure établie par les lois pour la contestation des élections pour la chambre des Communes du Canada et pour la contestation des élections pour l'Assemblée législative dans la province de Québec; et que le défendeur est requis, dans la présente instance, de faire voir en vertu de quelle autorité il prétend avoir droit d'exercer la charge d'échevin de la cité de Montréal;

"Considérant que par la même charte (section 42) certains actes y mentionnés sont déclarés être des actes de corruption, et que ceux qui sont convaincus de s'être rendus coupables de tels actes sont privés pour toujours du droit de voter à aucune élection municipale dans la dite cité, ou d'être élu maire ou échevin de la dite cité pendant trois années (sect. 43), et que tous les votes enregistrés en violation des dispositions susdites seront considérés comme nuls et de nul effet;

"Considérant que le défendeur en cette cause étant assigné à faire voir sur quoi il se fonde pour exercer la dite charge, a le droit de demander que si des votes nuls ont été donnés en sa faveur, à l'élection que les requérants contestent, le candidat Moses Malone s'est rendu coupable d'actes qui le privent d'être élu échevin, et que des votes que la loi déclare nuls ont été donnés aussi à la même élection en faveur du dit Moses Malone, et de démontrer qu'après défalcation faite des votes nuls qui auraient pu avoir été donnés de part et d'autre la majorité des votes conformes à la loi était en sa faveur ;

"Considérant que pour se défendre, le défendeur n'est pas tenu de se borner à prouver la légalité des votes donnés en sa faveur, mais qu'il a droit de désigner les votes nuls qui ont pu être donnés pour son adversaire afin de faire connaître qu'il a encore une majorité légale, quoique son siège ne soit pas demandé pour Moses Malone par la requête ; et qu'il est bien fondé aussi à démontrer que Moses Malone était inéligible, afin de faire voir que lui-même, le défendeur, a été seul éligible et par conséquent seul élu à l'élection mise en question ;

"Considérant que la troisième défense du défendeur, qui est rencontrée par une réponse en droit et une requête afin de l'annuler de la part des requérants, n'est pas mal fondée en droit ;

"Nous, juge soussigné, renvoyons la dite réponse en droit et la dite requête des requérants, avec dépens contre eux, distraits," etc.

Answer-in-law dismissed.

Mercier & Martineau for petitioner.

Curran & Grenier for defendant.

THE MOUSSEAU COMMISSION.

Messrs. Joly and Robidoux having withdrawn from the Commission appointed to investigate the charges brought by Mr. Mercier against the Hon. Mr. (now Justice) Mousseau (see page 249), the following letter was addressed by Mr. Mercier to the three remaining members of the Commission :

MONTREAL, 18 juillet 1884.

MM. DESJARDINS, NANTÉL ET ASSELIN,

L'hon. M. Joly et M. Robidoux se sont retirés et ont déclaré qu'ils ne prendraient plus

part aux procédés ultérieurs de cette commission, vu votre détermination d'empêcher la production de la preuve offerte contre l'honorable juge Mousseau.

La commission créée à la dernière session de la législature provinciale de Québec a été constituée en tribunal spécial, composé de cinq personnes, désignées nominativement dans la loi, et ce sont ces cinq personnes seules qui pourraient procéder, qui jusqu'à présent ont présidé à l'enquête ordonnée par la législature.

La loi ayant donné à ces cinq personnes seules et réunies ensemble le pouvoir exclusif de procéder à l'enquête des faits dénoncés devant l'assemblée législative, ce pouvoir n'était pas conféré à la majorité. Je crois que vous êtes sans juridiction pour procéder ultérieurement, vous trois en l'absence de vos deux collègues.

D'ailleurs, et je regrette d'avoir à le constater, deux des juges s'étant retirés, parce que, dans leur opinion, justice n'était pas rendue par la majorité, ce serait de l'imprudence de ma part que de continuer à offrir des preuves à l'appui de mon accusation.

Je déclare donc décliner votre juridiction et refuser de faire entendre de nouveaux témoins, me réservant toutefois le droit d'assister aux séances que vous jugerez à propos de tenir, pour surveiller les intérêts publics et les miens, et faire telles procédures que les circonstances exigeront et que la loi me permettra.

J'ai l'honneur d'être,
Messieurs,
Votre obéissant serviteur,
HONORÉ MERCIER.

After taking time to consider, the three commissioners above named pronounced the following decision :

M. DESJARDINS.—Les savants avocats qui ont discuté hier devant nous la question du droit de la majorité des membres de cette commission de siéger en l'absence d'un ou deux de leurs collègues ont dit, de part et d'autre, que cette question était nouvelle, et qu'ils n'avaient point trouvé d'autorités sur ce sujet. Pour nous, comme pour eux, dans de semblables circonstances, il est plus difficile de former notre opinion.

Le premier point à décider est de savoir si nous sommes une commission royale, ou un comité de l'Assemblée législative continuant ses travaux, après la prorogation de la législature, en vertu d'un statut lui donnant ce pouvoir.

Nous ne sommes certainement pas une commission royale. La nomination des commissions royales pour le bon gouvernement de la province est de prérogative royale. Elle est faite par l'exécutif sous sa responsabilité à la législature, comme pour l'exercice de toutes les prérogatives royales. On a souvent cité le chapitre 8 de la 32 Vict. intitulé: "Acte concernant les enquêtes sur les affaires publiques." Ce statut ne fait qu'autoriser "le lieutenant-gouverneur en conseil," s'il juge "à propos de faire instituer une enquête sur quelque objet ayant trait au bon gouvernement de cette province," etc, à accorder aux commissaires ainsi nommés le pouvoir d'assermenter les témoins et de leur faire produire les documents nécessaires aux fins de l'enquête.

Dira-t-on que nous sommes une commission spéciale en vertu du chapitre 3, de la 47 Vict.? Le statut ne contient rien au sujet du *quorum* pour les séances de la commission. Alors il faut référer à l'acte concernant l'interprétation des statuts de cette province, qui dit que la section dix-neuf de la cédule de l'article 17 du code civil s'applique à tous les actes de la législature. Or cette section 19 de la cédule de l'article 17 du code civil se lit comme suit: "Lorsqu'un acte doit être exécuté par plus de deux personnes, il peut l'être valablement par la majorité de ces personnes, sauf les cas particuliers d'exception."

Le chap. 3, 47 Vict., ne fait pas d'exception: donc la section du code civil s'appliquerait.

On a cru trouver un précédent dans le jugement du Conseil Privé dans l'affaire de l'arbitrage entre les provinces d'Ontario et de Québec, au sujet de l'actif et du passif à être partagés entre elles après la confédération. On se rappelle que Son Honneur le juge Day, qui représentait la province de Québec dans la commission d'arbitrage, donna sa démission. Les deux autres arbitres continuèrent leurs travaux et rendirent la sentence que l'on sait. Loin de penser que l'on puisse

s'appuyer sur ce précédent pour nier à la majorité de cette commission le droit de continuer l'enquête, je suis bien convaincu que l'on doit en conclure tout le contraire, puisque la cinquième clause du jugement du Conseil Privé se lit comme suit:

"Qu'après qu'un des arbitres eût ainsi résolu d'offrir la démission de sa charge et que sa démission eut été ainsi acceptée et qu'il eut été décidé de révoquer ainsi son autorité, les deux autres arbitres pouvaient légalement procéder à l'audition du cas et rendre une sentence finale."

Il n'y a pas l'ombre d'un doute dans mon esprit que la législature a voulu donner au comité de l'assemblée législative nommé pour s'enquérir des faits mentionnés dans la déclaration de l'honorable M. Mercier, le droit de continuer et de terminer ses travaux après la prorogation. Je me rappelle parfaitement ce qui s'est passé. J'ai entendu la discussion qui s'est faite à l'assemblée législative sur ce sujet. Deux comités d'enquête avaient été nommés. Nous étions à la fin de la session, et il était évident que ces comités étaient dans l'impossibilité absolue d'exécuter les ordres de la chambre, si la prorogation devait avoir lieu sous peu de jours. La session avait déjà été très longue. Il ne pouvait pas être raisonnablement question d'obliger la députation, qui avait fini ses travaux parlementaires, à rester plusieurs semaines dans la capitale pour attendre les rapports des comités. On pouvait choisir entre deux moyens. La chambre pouvait s'ajourner à une date assez éloignée pour donner aux comités le temps de faire les enquêtes qu'elle avait ordonnées. Mais ce moyen offrait l'inconvénient de faire revenir la députation à Québec. On s'arrêta à l'idée de faire passer un statut pour permettre aux membres de ces comités de faire les enquêtes après la prorogation de la législature.

À sa première séance, pendant la session, le comité avait, à l'unanimité, fixé son *quorum* à trois membres et cette partie de son rapport avait été adoptée par la chambre.

Le projet de loi a été rédigé par l'honorable procureur-général et l'honorable M. Mercier. La chambre, en adoptant ce projet de loi, n'a certainement pas voulu restreindre le pouvoir qu'elle avait donné au comité en l'auto-

risant à siéger avec un quorum de trois de ses membres.

Ce qui prouve que la chambre a voulu, par ses comités, conserver le contrôle de ces enquêtes, c'est que par la loi qu'elle a adoptée, elle a ordonné aux comités de déposer "leur rapport avec tous leurs procédés, témoignages et pièces produites, en toute diligence entre les mains de l'Orateur de l'Assemblée législative."

Je conclus donc que notre devoir est de continuer à exécuter l'ordre de la législature, et que nous nous exposerions à la censure de la chambre si nous ne le faisons pas.

M. ASSELIN.—La question soulevée et que nous sommes appelés à régler est la suivante : "Deux commissaires s'étant retirés et refusant d'assister aux séances, les trois autres, formant la majorité, peuvent-ils légalement siéger ? La question est importante et demande toute l'attention possible.

Pour arriver à une décision sûre sur ce point, je suis d'opinion qu'il faut d'abord considérer ce que nous sommes, et, ce premier point fixé, il est facile de connaître quelle est la loi à laquelle nous nous trouvons soumis.

Considérons les faits qui ont amené la création de cette commission, et, en pesant ces faits, nous arrivons, suivant moi, facilement à trancher la question qui nous occupe.

A la dernière session de la législature de Québec, l'honorable M. Mercier, député de Saint-Hyacinthe, met devant la chambre une déclaration énumérant certains faits. Sur cette déclaration, la chambre prend action et nomme un comité spécial composé de l'honorable M. Joly et de MM. Desjardins, Asselin, Nantel et Robidoux, avec instructions de s'enquérir de la vérité des faits mentionnés dans la dite déclaration. Ce comité a tenu quelques séances, mais comme il lui était impossible de terminer ses travaux avant la prorogation de la législature, il a fallu aviser aux moyens à adopter pour permettre l'enquête après la prorogation.

Je me rappelle qu'alors il a été question de nommer une commission royale, mais ce projet a été ensuite abandonné pour arriver à la passation du statut 47 Vict., chap. 3. Il suffit de lire attentivement cette loi pour en découvrir la portée. Cette loi a été passée

pour donner des pouvoirs additionnels au comité spécial nommé pendant la session, entr'autres, celui de siéger pendant la vacance et celui d'assigner et entendre les témoins, suivant les formalités de l'acte 32 Vict., chap. 8. Il est vrai que cette loi a nommé commissaires des membres du dit comité spécial et a formé pour ainsi dire un nouveau corps, mais en même temps, suivant moi, elle a conservé à ces commissaires le caractère d'un comité de la chambre et certains pouvoirs accordés à ces comités.

Nous pouvons donc consulter avec avantage la loi régissant les comités de la Chambre, car elle s'applique au corps que nous formons en autant qu'elle n'est pas incompatible avec les dispositions du statut qui a constitué notre commission (voir règle 80 des règles de la Législature de Québec). Je suis d'opinion que cette règle s'applique à notre commission comme elle s'appliquait au comité spécial. D'après cette règle la majorité des membres d'un comité compose le quorum lorsqu'il n'est pas autrement fixé. Voilà une des raisons pour m'engager à venir à la conclusion à laquelle je dois arriver.

De plus nous sommes nommés en vertu d'un statut de la législature de Québec; ce statut doit être interprété suivant la règle posée dans la 31 Vic., ch. 7. Le 2e Sect. de ce statut dit que la sec. 19 entr'autres de 17 C. C., s'applique à tous les actes de la Législature de cette Province. Or que dit cette section 19? ce qui suit : "Lorsqu'un acte doit être exécuté par plus de deux personnes, il peut l'être valablement par la majorité de ces personnes, sauf les cas particuliers d'exception."

Je viens de dire en quelques mots ce que nous sommes suivant moi, et aussi mentionner la loi qui doit nous régir. Maintenant pouvons-nous être une commission royale ? Evidemment non, puisque la législature elle-même, pour empêcher la nomination d'une commission royale, a passé le statut ci-dessus mentionné (47 Vict. ch. 3.) Nous avons, il est vrai, certains des pouvoirs accordés aux commissions royales. Mais cela ne nous constitue pas commission royale.

Nous ne sommes pas, non plus, un comité d'arbitrage ou d'expertise. Mais admettons pour le moment que nous soyons un sembla-

ble comité, la question se trouverait décidée par le plus haut tribunal auquel on puisse en appeler, le Conseil Privé, — et cela dans la cause d'arbitrage entre la province d'Ontario et la province de Québec. Les détails de cette affaire sont connus.

Pour les raisons ci-dessus données, je suis d'opinion que dans le cas où MM. Joly et Robidoux voudraient persister à ne pas assister aux séances de cette enquête, la majorité des commissaires doit siéger pour remplir les devoirs à eux confiés par la législature de Québec et continuer l'enquête commencée. Un des savants avocats nous a dit que, lors même que nous aurions le droit de siéger, en l'absence de deux commissaires, par respect pour les convenances et pour l'opinion publique, nous ne devrions pas siéger. Je ne suis pas de cette opinion et je ne crois pas que nous blessions les convenances ni l'opinion publique du moment que nous ne faisons que remplir un devoir.

M. NANTÉL.—La question sur laquelle nous avons à nous prononcer est celle-ci : Deux membres du comité spécial nommé à la dernière session de l'Assemblée Législative, pour s'enquérir des accusations portées relativement à l'octroi du palais législatif, s'étant retirés, ce comité cesse-t-il d'exister et a-t-il le droit de continuer à tenir l'enquête dont il est chargé, et de faire rapport suivant qu'il en a reçu instruction du corps parlementaire qui l'a créé ?

Les différents points en discussion se rapportent, au fond, à une question principale : Quelle est la nature de la commission ou du comité que nous formons ?

On a émis bien des opinions à cet égard.

1o. Sommes-nous un comité ou commission parlementaire revêtue de droits plus étendus et absolument nécessaires pour nous permettre de faire, en dehors de la session, ce que nous avons à faire durant la session ?

2o. Ou bien, sommes-nous constitués en commission royale par le statut spécial qui nous nomme, en référant à l'acte 32 Vict., chap. 8, et qui nous confère un droit absolument nécessaire pour accomplir nos fonctions, savoir : le droit d'assermenter les témoins, de les contraindre à comparaître devant nous, etc., etc.

3o. Sommes-nous un bureau d'arbitres ?

4o. Enfin, formons-nous un tribunal chargé de faire une enquête et de rendre jugement comme dans une cause ordinaire ?

Pour ce qui est d'abord de cette dernière question, qui peut prétendre que la Législature provinciale peut créer des tribunaux autres que ceux autorisés par l'acte constitutionnel de 1867 ou par des statuts spéciaux ? Et de fait, avons-nous à juger ? Non, nous avons à faire rapport à la Chambre, comme députés, et la Chambre, sur ce rapport qui doit exprimer des opinions et non une décision, se prononcera et prendra l'action qu'il lui plaira d'adopter.

2o. Sommes-nous un bureau d'arbitres ? Par qui avons-nous été nommés ? Par toute la Chambre, unanimement. Personne n'a été et n'a pu être nommé par un parti politique en particulier. Notre comité, ou commission, a été nommé pour sauvegarder l'intérêt public et celui du bon gouvernement de la province, ainsi que l'honneur et la dignité de la Chambre en général, et non d'un certain nombre des membres de la Chambre.

Aucun parti, comme parti, ne pouvait réclamer la nomination d'un ou de plusieurs commissaires, pour protéger ses intérêts sectionnels. Dans un bureau d'arbitres, c'est différent ; chaque partie intéressée a le droit strict, absolu, de se faire représenter par la personne qu'elle désigne, et dans une matière de droit privé, il n'y aurait pas de bureau d'arbitres possible et légal, si une de ces parties manquait de choisir son arbitre particulier. En est-il de même pour nous ? Non. La Chambre toute entière nous nomme et nous la représentons toute entière. Tel est si bien le cas, que nous avons été nommés aussi bien par la section de la Chambre que l'on appelle l'opposition que par la section ministérielle.

Tel est si bien encore le cas que l'opposition, lorsqu'il s'est agi de nommer le comité d'enquête sur l'accusation portée contre un de ses membres, M. Mercier, au sujet du règlement de la contestation de l'élection de M. Mousseau, l'opposition, dis-je, par motion de M. Gagnon, choisissait les membres de ce comité entièrement dans le parti ministériel. Les honorables MM. Taillon, Lynch et Turcotte, et MM. Faucher de Saint-Maurice et Désaulniers ont été ainsi désignés pour for-

mer ce comité. N'est-ce pas la preuve la plus évidente que l'opposition n'a jamais prétendu avoir un droit absolu de se faire représenter parmi nous, et qu'elle ne l'a été que pour des raisons de bon vouloir, de courtoisie, d'opportunité en un mot, et non, encore une fois, de droit strict et absolu ?

C'est le contraire dans un bureau d'arbitres. Non ; et c'est pour cela que l'on exige que toutes les parties soient représentées, *simul et æmel*, dans les causes entre particuliers soumises à l'arbitrage. Je dis *entre particuliers*, car il en a été décidé bien autrement dans le cas de l'arbitrage interprovincial, mû entre la province de Québec et celle d'Ontario, et jugé, le 18 mars 1878, par le Conseil Privé de Sa Majesté.

Au reste, cette théorie, qui est la seule vraie, savoir, qu'une fois nommés commissaires ou membres d'un comité, nous ne représentons plus un parti, mais toute la Chambre, a été admise par l'honorable M. Laflamme lui-même, quoique M. Mercier l'ait rejetée dans son argumentation et ait prétendu que MM. Joly et Robidoux représentent de droit le parti libéral dans ce comité.

3o. Sommes-nous une commission royale ? Où est l'instrument émané sous le grand sceau de l'Exécutif qui nous nomme ? Où est notre commission exigée par la sect. 9, 32 Vict., chap. 8 ? Je ne la vois nulle part ; notre commission émane de la Chambre purement et simplement, et la Chambre n'a pas le droit de nommer une commission royale. C'est l'Exécutif, le lieutenant-gouverneur en conseil, seul, qui a ce droit. La Chambre ne peut nommer que des comités. Libre à elle de leur donner tous les pouvoirs qu'elle juge nécessaires, savoir même, ceux des commissions royales, mais cela ne saurait en aucune manière leur enlever, à ces comités, le caractère qu'ils ont constitutionnellement et qui découle entièrement du corps créatif, c'est-à-dire, de la Chambre, et participe uniquement des droits et des pouvoirs de cette dernière.

4o. Enfin, il ne reste plus que le comité parlementaire, et c'est ce que nous sommes, pas autre chose. Peut-on prétendre sérieusement que nous ayons perdu notre caractère de comité parlementaire, parce que l'on a été obligé d'adopter un bill absolument nécessaire pour nous conférer les droits sans les-

quels nous ne pouvions agir en dehors de la session ? La Chambre ne pouvait créer autre chose qu'un comité, et c'est ce qu'elle a fait. A ce comité ou à cette commission, comme on voudra l'appeler, on a donné des pouvoirs extraordinaires, et parce qu'on lui a donné de tels pouvoirs, on prétendrait qu'on lui a enlevé le plus simple de ses droits, le plus incontestable de ses privilèges, celui d'avoir un quorum formé de la majorité de ses membres, suivant l'article 80 des règlements de la Chambre, cela me paraît insoutenable.

Alors que nous siégeons durant la session et que nous avons moins de pouvoirs qu'aujourd'hui, nous avons fixé notre quorum et la Chambre a approuvé cet acte de notre part. Constitué ensuite par un bill spécial, nous conférant plus de droits que nous en avons tout d'abord, nous sommes venus à Montréal ; nous avons organisé notre commission et avons commencé par fixer notre quorum à trois ; MM. Joly et Robidoux n'ont fait aucune objection quelconque, et on prétend aujourd'hui que nous n'avions pas ce droit, que nous ne sommes plus rien parce qu'il a plu à deux d'entre nous de se retirer, sans tenir compte de l'ordre de la Chambre qui nous ordonne à tous de procéder avec toute la célérité possible à tenir cette enquête. Si l'on admettait qu'il suffit de la retraite d'un d'entre nous pour dissoudre un comité parlementaire comme le nôtre, serait-il possible de procéder à aucune enquête publique de la nature de celle-ci ? Lorsqu'on verrait contre un accusé une preuve tant soit peu concluante, il suffirait qu'un membre de la commission, un ami politique se retire, pour couper court à toute investigation ! Encore une fois il est impossible d'admettre une pareille théorie.

Elle n'a pas été admise dans une cause d'arbitrage, entre les provinces d'Ontario et de Québec, cause où, pourtant, il y a bien des raisons de la plus haute gravité pour exiger la présence de tous les arbitres ; et à plus forte raison ne peut-on pas l'admettre pour un comité ou commission d'enquête parlementaire dont chaque membre n'a pas pour rôle, pour mission à remplir, de représenter les intérêts d'un parti en particulier, mais de toute la Chambre et par là même de tout le pays.

C'est donc un droit, c'est même un devoir pour nous de continuer notre investigation. Nous ne sommes responsables qu'à la Chambre sur une matière de *quorum* et la Chambre pourrait nous réprimander et nous censurer si nous n'exécutons pas ses ordres. Car on n'ignore pas que nous siégeons ici en notre qualité de députés; que nous sommes soumis au contrôle absolu de la Chambre en tout point; que comme députés et membres de la Chambre, nous sommes tenus de remplir les fonctions qu'elle veut exiger de nous, et notamment de servir dans les comités qu'elle choisit.

L'on ne viendra pas prétendre que nous n'avons pas agi, jusqu'à présent, comme membres de tel comité parlementaire. Serions-nous membres de cette commission ou comité, si nous n'étions pas membres de la Chambre, et quelqu'un peut-il soutenir que même nous ne serions pas déqualifiés comme membres de la Chambre si nous avions accepté d'être nommés commissaires au moyen d'un instrument et d'une commission émanée sous le grand sceau de l'Exécutif?

Et va-t-on supposer que la Chambre ait voulu nous mettre dans une position aussi précaire, aussi pleine de dangers pour chacun de nous? Non, elle ne l'a pas voulu et ne pouvait le vouloir non plus.

Etant un comité de la Chambre, composé de députés responsables à la Chambre, et c'est en cela surtout que l'on distingue un comité d'une commission, il serait puéril de vouloir nous enlever le simple droit d'avoir notre *quorum*, qui est de trois; nous sommes trois, et je suis d'opinion que nous devons continuer à remplir les devoirs dont nous avons été chargés; et voudrions-nous nous retirer que nous n'en aurions pas le droit, pas plus que MM. Joly et Robidoux.

Avant de terminer, je tiens à protester contre certaines assertions allant à dire que nous voulons empêcher M. Mercier de prouver ses accusations contre le juge Mousseau. Il suffit de lire les questions posées et les réponses, ainsi que les objections maintenues ou rejetées, pour reconnaître que nous avons accordé toute la latitude possible à l'accusateur. Mais du moment qu'il a tenté de sortir des matières dont nous sommes chargés de nous enquérir, nous considérons que

c'était notre droit de l'arrêter et c'est ce que nous avons fait. Nos instructions sont claires et formelles sur ce point et, pour ma part, je suis convaincu que nous ne pouvons, en aucune manière, les outrepasser.

Je conclus donc en disant que non-seulement c'est un droit, mais encore un devoir impérieux pour nous de continuer l'enquête qui nous a été confiée.

M. Desjardins lit la résolution suivante adoptée unanimement par la commission :

Après la déclaration faite par un de nos collègues, l'honorable M. Joly, qu'il ne continuerait pas prendre part aux travaux de la commission à moins qu'on ne lui permit de poser au témoin Alphonse Charlebois une question sur un point que la commission avait déjà déclaré à l'unanimité ne pas être pertinent à la cause, et après le départ de deux des membres de la commission, nous devons délibérer sur ce que nous devons faire dans les circonstances. Nous en sommes arrivés à la conclusion que nous n'avons pas le droit de refuser d'accomplir un devoir qui nous a été imposé, en premier lieu, par la volonté de l'Assemblée législative de Québec, exprimée à l'unanimité de ses membres, et secondement par la volonté formelle de la législature de Québec, qui, par le chap. 3, 47 Vict. a donné au comité que l'Assemblée législative avait nommé pour s'enquérir des accusations faites, de son siège en chambre, par l'honorable Honoré Mercier, député du district électoral de Saint-Hyacinthe, au sujet du contrat du Palais législatif, le pouvoir de continuer ses travaux après la prorogation de la législature.

En conséquence nous continuons à exécuter l'ordre qui nous a été donné par la législature de Québec.

Mercier, Q.C., in support of the charge.
Lacoste, Q.C., for Mr. Mousseau.

The *Law Journal* (London) says :—"On Tuesday the hearing of a case before Mr. Justice Smith and a common jury was adjourned at half-past one for lunch. At two o'clock the jurors and counsel had re-assembled, when Justice Stephen, whose court also had adjourned for lunch, entered the Court, took his seat on the bench, and was apparently about to resume the trial of the action which had been begun by Mr. Justice Smith. Thereupon the Associate ventured to ask whether, amid the intricacies of the new building, the learned Judge had not lost his way and come into the wrong court. It appeared that this was so, and Mr. Justice Stephen retired amid some amusement."

The Legal News.

VOL. VII. AUGUST 16, 1884. No. 33.

THE SALVATIONISTS IN MONTREAL.

It is generally unsafe as well as unfair to criticise the decision of a magistrate, when the criticism is based exclusively upon a newspaper version of the case—not that reports are not usually correct, but because it is even more dangerous to review a decision of fact by a judge who has seen and heard the witnesses, upon what is necessarily a hasty condensation of the evidence, than when the entire evidence is before us in writing. But if the reports of the trial of the Salvationists in Montreal be not grotesquely one-sided, we fail to see on what grounds the gentleman temporarily discharging the duties of Recorder decided that there had been a breach of the law. Two young men styled "Salvationists" (not to be confounded with the "Salvation Army"), were singing a hymn on a Sunday evening in a large public square. The intention, we presume, was to attract an audience for the observations which were to follow. An over-zealous policeman chose to interfere, and the young men were carried off to a police station, and had to answer next day to a charge of unlawfully causing a disturbance. The following was the by-law under which the charge was brought:

"All persons loitering in the streets, or highways, and obstructing passengers by standing across the pathways, or by using insulting language, or in any other way; or tearing down or defacing signs, breaking windows, breaking doors or door-plates, or the walls of houses, roads or gardens, destroying fences; causing a disturbance in the streets or highways, by screaming, swearing, or singing; or being drunk; or impeding or incommoding peaceable passengers, shall be guilty, etc."

It was evidently necessary to prove the "disturbance by singing," which is the only clause applicable; but this was distinctly negatived by the evidence of Lord Cecil and others present. There was no disturbance in the ordinary sense, and it appears that these young men have pursued their evangelical labours unmolested for several years past.

The Acting-Recorder said that the defendants were guilty, but contented himself with dismissing them with a caution. The termination is unsatisfactory, because it deprives the accused of an opportunity of appealing. It leaves an unquiet feeling that we do not enjoy the liberty which we assumed that we possessed. We have no particular sympathy with the people who resort to these methods of instruction: they would act prudently, it seems to us, if they preached and prayed and sang indoors; but until the law is changed it seems too absurd to say that while minstrel bands and ten cent shows are permitted to make their hideous din unchecked in the streets, a religious hymn cannot be sung in a quiet square of the city without bringing upon the actors the penalties enacted against common brawlers. The case might of course have assumed a different aspect if any of the persons resident in the vicinity had invoked the aid of the police, or if the singing and speaking had aroused opposition amongst the hearers. But of this the evidence does not give even a hint.

THE ANNALS OF A QUIET NEIGHBOURHOOD.

The case of *Lebeau v. Turcot* arises out of an incident which occurred in a rural parish. The circumstances are somewhat peculiar, and like the case of *Cooke v. Penfold* (7 L. N. 176) it has appeared in the newspapers, with variations. It has travelled as far as Columbus and Cincinnati, Ohio, for we find it in the *Weekly Law Bulletin* of those places, but the editor winds up by declaring that "this case must have originated in the imagination of a newspaper reporter." When the facts are understood, however, it does not seem so incredible. St. Laurent is a quiet parish—a very quiet parish indeed, though it lies within cannon shot of Mount Royal. Here, as in other parishes of the same order, before the American Colonies revolted and achieved their independence, the early settlers tilled their farms, and their children and grandchildren are born into the world and marry and die on the same lands. They form a yeomanry of a peculiar type. Joaquin Miller has lately spent some time amongst them, and done

justice to their simple virtues. There is not much law between the members of these communities who, indeed, are generally bound together by intermarriage, with the resultant affinity. But they are impatient of affront, and as personal encounters are not in fashion, the law is often resorted to for the settlement of verbal excesses. In the present instance, Turcot was a young man who had been temporarily employed by Lebeau, but being indiscreet in his attentions to some of the female members of the household he was dismissed. He sued Lebeau for wages, and while this case was pending, he resolved to take advantage of his office of collector of the offertory in the parish church, to put an affront upon his late master by rudely and pointedly omitting to present the plate to him. He called the attention of several of those present to what he was doing, and boasted of it afterwards. It was a boyish and silly trick. On the other hand, his employer would, doubtless, have acted in a more dignified manner if he had simply complained to the churchwardens of the improper conduct of the collector. He chose to seek his remedy in a court of justice. The result is not encouraging in a pecuniary point of view, for while the Court recognizes the right of action for an affront of this kind, the judgment of the judge acting as a jury is like the English verdict of a farthing damages. The plaintiff gets \$5 damages and \$5 costs, but he has to pay all his own counsel fees and expenses, less this sum of \$10. The gratification of a lawsuit will, therefore, probably cost him about a hundred dollars. The defendant pays the ten dollars and his own costs in addition.

A HAUNTED JUDGE.

The Supreme Consular Court of China and Japan has apparently lost a humorist in the person of its late Chief Judge, Sir Edmund Hornby, who has invented a capital ghost story for the amusement of two gentlemen who now tell the tale in the columns of the *Nineteenth Century* for the delectation of a wider circle. The uneasy spirit which haunted the Judge was that of a reporter who had just departed this life, and who came to Sir Edmund's bedside after midnight and re-

quested a *précis* of a judgment which was to be delivered on the following morning. It is at first blush appalling to discover that there are newspapers published in the other world, and that weary reporters are set to work *instantly* at their old trade as soon as they have shuffled off this mortal coil. But it is consoling to note that the toil in this instance lasted but two or three minutes. A few moments of purgatory sufficed to purge the soul of the reporter, and the Judge was haunted no more.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[In Chambers.]

MONTREAL, August 2, 1884.

Before RAMSAY, J.

Ex parte LEBEVEUX, Petitioner for writ of Habeas Corpus.

Keeping a disorderly house—32-33 Vict. chap. 29, sec. 79.

The petitioner was convicted in the Recorder's Court under the Summary Trial by consent Act (32-33 Vict. c. 32), of keeping a disorderly house within the police limits of the City of Montreal. Held, that the commitment (which followed the terms of the conviction) set forth no offence of which the Recorder could take cognizance, and that sect. 79 of 32-33 Vict. c. 29, was not applicable here, the said section applying only to cases tried on indictment, and where there has been a verdict.

RAMSAY, J. The petitioner was convicted "pour avoir le 22ième jour de juin courant, en la dite cité (Montréal), et depuis un mois, tenu une maison de désordre dans les limites de police de la dite cité," etc.

It was contended that this commitment was not sufficient, for that keeping a disorderly house was innocent in itself, and was at most only culpable as being the consequence of illegal acts. In a word that the offence depended on the kind of disorder.

It seems to be admitted that if there be no statute affecting criminal pleading to help the conviction, the charge is insufficiently set forth; but it is argued that if an offence is described in the language creating it or in

any act prescribing its punishment, it is sufficient;—32 & 33 Vict., c. 29, sec. 79. Sec. 30, 32 & 33 Vict., c. 32, was also referred to. With regard to the latter of these sections, it may at once be disposed of. The defect if it be founded is not formal; and the conviction, which I have had an opportunity of examining, is precisely in accordance with the commitment.

The application of the other statute gives rise to some difficulty. In the first place it does not apply to any offences other than those tried on indictment, and where there is a verdict. It might perhaps be argued that where there was a consent to waive trial by jury and to accept the jurisdiction of the magistrate, his judgment was equal to a verdict; but this is not a consent trial. The Court of Queen's Bench, over-ruling the decision in *Deery's case*, held that sect. 79 could not be extended, and so where a common law offence, like murder, was incidentally alluded to in a statute, without the words recognized by the common law as expressive of the crime of murder, a count of an indictment setting up an intent to murder without these words would be bad even after verdict.

The present case has given rise to a somewhat involved discussion, owing to the extremely unskilful manner, in which our criminal acts are drawn. It is only fair to say this in justification of the magistrates, who can hardly be expected, in the midst of the immense pressure of business in a great centre of population, to work out the Chinese puzzles which are prepared for them, unconsciously, I presume.

The making of criminal laws is one of those operations which does not demand the highest order of capacity; but it is an art which *amateur* commissions will not practise successfully.

It is evident the petitioner was convicted under the Summary Trial by consent Act (32 & 33 Vict., c. 32.) Generally speaking this is not an act creating new offences, incidentally it may be, however, by attaching a penalty to an act, and probably it does so in this case; but I think it would be violating the intention of sect. 79, even if we could get over the former objection, to apply it to the

reference to an act, absolutely innocent in itself, and which only becomes criminal because it is made penal. I may also add that it is not an offence "subjected to a greater degree of punishment," by cap. 32.

Section 15 of the Summary Trial by consent Act, creates an exception of a very awkward kind, and one quite unnecessary.

I am of opinion that the commitment in this case sets forth no offence of which the Recorder could take cognizance, that it covers no valid conviction, and therefore that the prisoner must be discharged.

Sexton and Pignolet, for the Petitioner.

Davidson, Q.C., and Ouimet, Q.C., for the Crown.

SUPERIOR COURT.

MONTREAL, July 3, 1884.

Before JETTÉ, J.

LEBEAU V. TURCOT.

Insulting conduct—Damages.

A person performing a voluntary and gratuitous service, such as the collection of the offertory in a church, will not be permitted to make use of his office to offend and humiliate a member of the congregation, and an action of damages will lie for such offence. A wilful and marked omission to present the plate to a member of the congregation, was held to be an offence for which an action lay.

The judgment fully explains the case:—

"La cour, etc.

"Attendu que le demandeur réclame du défendeur des dommages au chiffre de \$199, à raison de l'injure qu'il allègue lui avoir été faite le 23 décembre dernier par le défendeur, qui, chargé de faire la quête dans l'église de la paroisse de St-Laurent, aurait intentionnellement et malicieusement passé le banc du demandeur, sans solliciter l'offrande de ce dernier, présent alors, et ce, dans le but d'injurier et de mortifier le dit demandeur, et après avoir prévenu d'avance plusieurs personnes qu'il agirait ainsi à son égard, dans le but de l'humilier;

"Attendu que le défendeur plaide: 1o Qu'il remplissait dans la circonstance une fonction volontaire et gratuite et, par suite, n'était pas tenu de s'adresser au demandeur pour la dite quête, et qu'en conséquence, celui-ci n'a pas

de recours contre lui; 2o Qu'il a ainsi passé le demandeur ceci n'a été que par inattention et sans malice; mais que le demandeur qui, vers novembre dernier, a renvoyé le défendeur de son service, sans motif plausible, et qui a été poursuivi par lui, en a conservé contre le défendeur une rancune et un mauvais vouloir qui l'ont porté à plusieurs reprises à tourner le dos au dit défendeur, lorsque celui-ci se présentait à son banc pour la quête; et que ce mauvais vouloir du demandeur est l'unique mobile de sa demande actuelle;

" Considérant que le demandeur a prouvé les allégations de sa demande, et notamment que c'est de propos délibéré et avec intention de froisser et d'humilier le demandeur que le défendeur a passé son banc dans l'occasion susdite; qu'il s'était même vanté d'avance de ce qu'il allait faire et qu'il y a attiré l'attention de plusieurs personnes, au moment même de la quête, et qu'après l'office il en a ri et triomphé avec plusieurs personnes;

" Considérant que bien que le défendeur remplit dans cette circonstance une fonction gratuite et volontaire, il était tenu de s'en acquitter avec une égale politesse pour tous les paroissiens et ne pouvait, par des omissions volontaires, en signaler quelques-uns à la risée des autres;

" Considérant, néanmoins, que bien que la conduite du défendeur, en la circonstance susdite, ait été répréhensible et qu'il ne saurait échapper impuni, les faits prouvés ne justifient cependant qu'une condamnation légère;

" Renvoie les exceptions et défenses du défendeur et le condamne à payer au demandeur, à titre de dommages, la somme de \$5 courant, et les dépens d'une action de cette classe, distracts, etc."

Augé & Lafortune for the plaintiff.

Loranger & Beaudin for the defendant.

SUPERIOR COURT.

MONTREAL, January 14, 1884.

Before MATHIEU, J.

JOYCE v. THE CITY OF MONTREAL.

Special assessment roll—When it comes into force—Prescription of three months—42-43 Vict. (Q.) ch. 53, s. 12.

A special assessment roll to defray the cost of an improvement in the city of Montreal comes into force from the date of its deposit in the office of the City Treasurer, and the prescription of three months under 42-43 Vict. c. 53, s. 12, applicable to proceedings to set aside such roll, runs from that date.

The pretention on the part of the City was that the assessment roll having been confirmed on the 12th April, the three months within which by the statute of 1879 it could be contested, expired on the 12th July following—since the delay, under the statute, ran from the coming into force of the roll, and the roll came into force the moment it was completed and signed by the Commissioners, which, it is admitted, was on the 12th April. Therefore the petition filed on the 17th July came too late. The legislation concerning the city gives it a privilege on the real estate, belonging to any rate payer, for the amount of any tax imposed on such rate-payer, and such privilege on real estate is exempted from registration. The date of the privilege of the city, for the amount of the tax now in question, clearly dates from the moment the roll was confirmed by the Commissioners. The delay given by section 85 of the charter to pay the tax does not prevent its being in force, the term of payment being a favor granted for the convenience of the rate-payers.

Barnard, Q. C., for petitioners urged that the delay under the statute ran from the coming into force of the roll — *la mise en force* — according to the French version. The remedy of attacking a roll, or any other municipal proceeding by a petition to quash, was given to the citizens of Montreal by the statute of 1879 for the first time. Until then, there was no occasion for any particular statement as to when a roll comes into force, and accordingly no such statement is to be found in the city charter. We are not, however, without any legislative guidance in the matter. The clause in question in the statute of 1879 is a transcript of articles 697 and 708 of the municipal code, and as the municipal code carefully defines when a roll comes into force, that definition must prevail, since it is found not only in a statute *in pari materia*, but in the very statute from which

the clause giving the power to contest was extracted. Article 817 of the municipal code provides that an assessment roll comes into force fifteen days after it has been deposited in the office of the council, provided public notice has been given of such deposit, within such delay.

But even if the Montreal city charter stood alone, it is submitted that the delay to contest would clearly run, not from the confirmation of the roll by the Commissioners, but from the expiration of the notice given by the city treasurer under sect. 185 that the roll is completed. Mark that subsection 3 of sect. 185 says that "after the Commissioners shall have completed the roll, they shall deposit it in the office of the city clerk, and give notice to the parties taxed by said roll, that they have fifteen days from the last insertion of the notice to examine the roll and make their complaints on a certain day to be fixed." Subsection 4 says "that on the day fixed, the Commissioners shall hear the complaints and may adjourn from time to time, as may be necessary, to hear and examine such complaints, and after such examination the said Commissioners may maintain, modify or amend, at their discretion, the said roll, without the necessity of any further notice." Subsection 5 says "that the said roll, when finally settled by the Commissioners, as aforesaid, shall be filed and kept of record in the city treasurer's office, and the said special assessment shall be due and may be recovered in the same manner as the ordinary taxes and assessments."

Section 86 shows how the ordinary taxes and assessments become due and payable. Upon the roll being filed in his office, the city treasurer gives public notice that the roll is completed and deposited at his office, and that all persons whose names appear therein as liable are required to pay the amount of their tax within ten days from the last insertion of the notice.

Under these provisions the coming into force of the roll necessarily depends on the publication — which brings it to the knowledge of the parties interested. It cannot be in force so long as it remains in the Commissioners' hands, although duly signed and

confirmed by them — because so long as it is not filed with the city treasurer, it is in their power to alter it — "without the necessity of any notice." Nor can the mere filing of the roll in the city treasurer's office put it into force, since the fact of the filing is not known until notice has been given of it.

To say that the delay runs from the date the roll is confirmed by the Commissioners leads to this exorbitant result, that the three months, given by the statute to contest, might have expired before the parties could possibly have heard of the confirmation, and therefore could possibly have exercised their right to contest.

The question of the date of the privilege of the city on the real estate of the rate-payer for the amount of the tax is a different question. There might or might not be good reasons to make the privilege run from the filing of the roll in the city treasurer's office, or for that matter from the date of the confirmation, assuming the tax eventually to turn out to be a legal one. But the opportunity to test the legality of the tax should be full and entire, within the delay the law grants, and this opportunity would be unduly restricted or wholly destroyed if the delay ran from any period back of the expiration of the ten days from the last insertion, from which date the constructive notice exists, and not before.

The following is the judgment:—

"La cour, après avoir entendu les parties par leurs avocats et procureurs respectifs sur le mérite de la réponse en droit du requérant au premier plaidoyer de la défenderesse, par lequel dit plaidoyer la défenderesse soutient que le droit du requérant d'attaquer le rôle de cotisation en question en cette cause est prescrit depuis le 12 d'avril 1881, avoir examiné le dit plaidoyer, la dite réponse en droit et tout le dossier de la procédure, et sur le tout mûrement délibéré;

"Attendu que le dit requérant demande par sa requête produite le 17 avril 1882 la cassation d'un rôle de cotisation pour répartir sur les personnes que les commissaires nommés par la Cour Supérieure jugeraient être intéressées dans l'établissement du carré de la Puissance, lequel rôle de cotisation a été

déposé le 12 janvier 1882 dans le bureau du Trésorier de la cité ;

“ Attendu que la dite défenderesse allègue dans son premier plaidoyer, que le dit rôle de cotisation spécial pour l'établissement du carré de la Puissance a été dûment ratifié et confirmé le 12 janvier 1882, par les commissaires nommés à cette fin ; que la requête du requérant demandant la cassation de ce rôle de cotisation spéciale est datée du 15 avril 1882, jour où elle a été signifiée à la défenderesse, savoir plus de trois mois après la confirmation et mise en force du dit rôle de cotisation ; que d'après les dispositions du statut de Québec de 1879, 42-43 Vict. ch. 53, s. 12, tout électeur municipal peut en son propre nom demander et obtenir pour cause d'illégalité la cassation de tout règlement, rôle de cotisation ou répartition, mais que le droit de demander telle cassation est prescrit par trois mois à compter de la date de la mise en force de tel règlement, rôle de cotisation ou répartition, et qu'après ce délai, tel règlement, rôle de cotisation ou répartition doit être tenu pour valide, ou obligatoire, à toutes fins que de droit ; que le dit délai de trois mois doit être compté du moment de la mise en force du rôle de répartition, savoir à compter du jour où le dit rôle a été complété ou confirmé par les commissaires, et que le droit de demander la cassation de ce rôle est prescrit et éteint en vertu du dit statut ;

“ Attendu que le dit requérant allègue dans sa réponse en droit demandant le renvoi du dit premier plaidoyer de la dite défenderesse, qu'il ne s'en suit pas que le rôle est en force parce qu'il a été confirmé et ratifié par les commissaires à une époque inconnue des contribuables ou personnes taxés, et du public ; que d'après la loi un rôle de cotisation générale ou spéciale dans la ville de Montréal, pour les fins municipales, ne devient en force que dix jours après la dernière insertion de l'avis que donne le trésorier dans les journaux que le rôle en question est complété et déposé dans son bureau (37 Vict., ch. 51, s. 85), et que jusqu'à tel avis les intéressés ne peuvent pas savoir si le rôle a été complété ou non ; qu'en supposant vraies les allégations de la défenderesse que le rôle en question a été ratifié et confirmé par les commissaires le 12 janvier 1882, et en supposant

même qu'il ait été déposé le même jour dans le bureau du trésorier, ce qui n'est pas même allégué, il ne s'en suivrait pas que le délai pour attaquer le dit rôle est expiré le 12 avril 1882 ; qu'il paraît par les allégations du dit plaidoyer lui-même que lorsque la requête du requérant a été signifiée à la défenderesse, le délai pour attaquer le dit rôle n'était pas expiré ;

“ Considérant que par la section 12 du chapitre 53 des statuts de Québec de 1879, 42-43 Victoria, il est décrété que tout électeur municipal peut, par une requête présentée à la Cour Supérieure siégeant dans le district de Montréal, demander et obtenir, pour cause d'illégalité, la cassation de tout rôle de cotisation ou répartition, mais que le droit de demander telle cassation est prescrit par trois mois à compter de la date de la mise en force de tel rôle de cotisation ou répartition, et qu'après ce délai, tout tel rôle de cotisation ou répartition sera tenu pour valide et obligatoire, à toutes fins que de droit, pourvu qu'il soit de la compétence de la dite corporation ;

“ Considérant que par la section 185 des statuts de Québec de 1874, 37 Vict. ch. 51, il est décrété qu'aussitôt après la confirmation et la ratification du rapport des commissaires par la cour, il sera du devoir des dits commissaires dans tous les cas où le dit conseil aura ordonné que le prix de revient des travaux ou améliorations soit supporté, en tout ou en partie, par les propriétaires ou intéressés avantagés, de procéder à cotiser et à répartir le prix ou compensation, conformément à la résolution du dit conseil sur chacune des propriétés qui auront été avantagées, et qu'aussitôt que le rôle spécial de cotisation sera terminé, les commissaires le déposeront au bureau du greffier de la cité, pour l'inspection et l'examen des parties intéressées, et donneront avis public dans au moins deux journaux anglais et deux journaux français publiés dans la dite cité, de l'achèvement et du dépôt du dit rôle spécial de cotisation ; que cet avis portera que les commissaires ont complété le dit rôle spécial de cotisation et qu'il a été déposé au bureau du greffier de la cité, où toute personne y intéressée peut le voir et l'examiner dans le délai spécifié dans le dit avis, lequel délai,

dans tous les cas, ne sera pas moins de quinze jours à partir de la dernière insertion du dit avis, et qu'après l'expiration du dit délai au jour et heure mentionnés dans le dit avis, les commissaires s'assembleront à l'Hôtel de Ville pour réviser le dit rôle spécial de cotisation; que les commissaires devront sur demande de quiconque se croit lésé s'assembler au jour, heure et lieu ci-haut mentionnés pour entendre et examiner toutes les plaintes qui leur seront faites relativement au dit rôle spécial de cotisation, et pourront ajourner, de temps à autre, selon qu'il sera nécessaire, pour entendre et juger les dites plaintes, et après tel examen les commissaires pourront maintenir, modifier ou amender, à leur discrétion, le dit rôle spécial de cotisation, sans autre avis ultérieur, et que le dit rôle spécial de cotisation une fois achevé et établi par les dits commissaires, comme susdit, sera produit et gardé de record dans le bureau du trésorier de la cité, et la dite cotisation spéciale sera due et pourra être recouvrée par la corporation de la dite cité, de la même manière que les taxes et cotisations ordinaires que la dite corporation est autorisée à imposer et à prélever par le dit acte;

"Considérant que par la section 85 du dit statut, il est décrété que lorsque les évaluateurs de la cité feront rapport du rôle de cotisation d'un des quartiers de la dite cité, après la révision complète du dit rôle et survenant le rapport d'un rôle de cotisation spéciale, le trésorier de la cité donnera avis public dans deux papiers-nouvelles publiés en langue anglaise et dans deux papiers-nouvelles publiés en langue française, que le dit rôle de cotisation est terminé et déposé dans son bureau, et que tous ceux dont les noms y sont inscrits comme tenus au paiement d'une taxe, d'une cotisation, ou d'une contribution sont obligés d'en payer le montant à son bureau, en l'Hôtel de Ville, sous dix jours à compter de la date de la dernière insertion du dit avis dans les dits papiers-nouvelles;

"Considérant que par les avis exigés par la dite section 185 ci-dessus mentionnée, les contribuables de la cité de Montréal ont et doivent avoir connaissance de la passation d'un rôle de cotisation spéciale, et qu'ils ont dû avoir connaissance de la passation du rôle de cotisation spéciale, dont il est question en

cette cause, et que par les ajournements qui doivent ou peuvent se faire, à compter du jour fixé dans les avis ils ont dû connaître le jour où le rôle spécial de cotisation a été achevé et établi;

"Considérant qu'il est décrété et qu'il résulte des termes de la sous-section 5 de la dite section 185 ci-dessus mentionnée, que le rôle spécial de cotisation se trouve achevé et établi par la révision qui en est faite par les dits commissaires, et qu'on doit considérer que le rôle de cotisation est mis en force à compter de son dépôt dans le bureau du trésorier de la cité;

"Considérant que bien que la cité ne puisse exiger le paiement des taxes avant l'avis requis par la section 85 du dit statut, cependant le rôle de cotisation n'en existe pas moins et n'en a pas moins force et effet pour établir un lien de droit entre la cité et les contribuables;

"Considérant que l'obligation résultant de la confection du dit rôle de cotisation, n'est pas une obligation conditionnelle et qu'elle n'est pas non plus à terme dans le sens de l'article 2236 du code civil, vu qu'il dépend de la cité d'en recouvrer le montant quand bon lui semblera, en donnant l'avis requis par la loi;

"Considérant qu'il résulte de ce que dessus que le délai de trois mois pour contester le dit rôle de cotisation doit être compté du jour de son dépôt au bureau du trésorier de la cité, et que la réponse en droit du dit requérant est mal fondée;

"A renvoyé et renvoie la réponse en droit du dit requérant, avec dépens."

Answer-in-law dismissed.

Barnard, Beauchamp & Barnard for petitioner.

R. Roy, Q.C., for defendant.

SUPERIOR COURT.

MONTREAL, July 9, 1884.

Before JETTÉ, J.

JOYCE v. THE CITY OF MONTREAL.

Special assessment roll—When it comes into force—Prescription of three months—42-43 Vict. (Q.), ch. 53, s. 12.

A special assessment roll to defray the cost of an improvement in the city of Montreal comes

into force from the time when it is finally confirmed by the Commissioners, and the prescription of three months under 42-43 Vict., c. 53, s. 12, applicable to proceedings to set aside such roll, runs from that date.

The judgment was upon the merits of the petition referred to in the preceding report:—

“ La cour, après avoir entendu la plaidoirie contradictoire des avocats des parties sur le fonds du procès mû entre elles, pris connaissance des écritures des dites parties pour l'instruction de leur cause, et sur le tout délié;

“ Attendu que par sa requête présentée à cette cour le 17 avril 1882, le requérant Joyce se plaint d'un rôle de cotisation, préparé par les commissaires nommés pour la fixation et répartition de la proportion à payer par les propriétaires intéressés dans l'établissement du square ou carré de la Puissance, et en demande la cassation ;

“ Attendu que la cité s'oppose à l'octroi de cette demande, soutenant qu'elle a été faite tardivement, savoir : plus de trois mois après la mise en force du dit rôle de cotisation, et que par suite elle est non recevable ;

“ Considérant que l'exercice du recours adopté par le requérant pour demander la cassation du rôle de cotisation susdit, est limité et restreint par l'article 12 du statut de 1879, chap. 53, à une période de trois mois, à compter de la date de la mise en force de tel rôle de cotisation ;

Considérant qu'aux termes de l'article 185 du statut de 1874, chap. 51, la procédure imposée aux commissaires chargés de préparer tel rôle de cotisation, est terminée et close par la confirmation de ce rôle par les dits commissaires, et que le dit rôle devient dès lors en force à toutes fins que de droit ;

“ Considérant qu'il est établi par les admissions des parties que le rôle de cotisation en question, dans l'espèce, a été finalement confirmé par les commissaires le 12 janvier 1882 ;

“ Considérant que l'article 85 du dit statut ne s'applique pas à tel rôle de cotisation ;

“ Considérant en conséquence que le délai de trois mois pour demander la cassation du dit rôle était expiré lorsque le requérant s'est pourvu, et que, par suite, il y a lieu de lui appliquer la déchéance prononcée par la loi ;

“ Benvoie la dite requête du requérant avec dépens.”

Petition dismissed.

Barnard & Barnard for petitioner.

R. Roy, Q.C., for defendant.

CIRCUIT COURT.

MONTREAL, JUNE 9, 1884.

Before PAPINEAU, J.

MAURICE V. DESROSIERES, & LEBEAUD, T. S.

Libel—Damages inconvertibles.

A sum of money allowed by a judgment as reparation for injury to reputation by slander or libel, is in its nature unconvertible.

The garnishee, in answer to the writ served upon him, declared that by a judgment of the Superior Court he had been condemned to pay the defendant the sum of \$50 damages.

The defendant contested the seizure on the ground that the judgment in question was rendered in an action of damages for libel, and that the amount was *inconvertible*.

The plaintiff submitted that the defendant's pretension might perhaps be sustained if the damages had been allowed for a bodily injury, as the money condemnation might in that case be regarded as alimony, but it was not so where damages were allowed for libel.

PAPINEAU, J., remarked that the authorities were divided on the question. Authors since the Code Napoleon held that damages for slander or libel could be seized, and there had been some decisions here in the same sense. But in the majority of cases it had been held that such damages were *inconvertibles*. His Honour was disposed to decide in the same sense. A sum of money awarded as damages for slander or libel partook of the nature of alimony, and was of a penal character. It ought not to be liable to seizure.

Saisie-arrest set aside.

T. Bertrand for plaintiff.

E. Lareau for defendant.

GENERAL NOTES.

Pump Court says: "Mr. Jesse Herbert is supposed to be the shortest barrister in England. 'Mr. Herbert,' a judge once said to him severely, 'It is customary for counsel to stand when they are addressing the court.' 'I am standing up, my Lord,' was the plaintive response. 'Eh, what?' said his Lordship, 'I beg your pardon, I'm sure. Go on, please.'"

The Legal News.

VOL. VII. AUGUST 23, 1884. No. 34.

AN IMPERIAL COURT OF APPEAL.

The *Law Journal* (London), of Aug. 2, says: "The Judicial Committee of the Privy Council has finished its list and given judgment in every case. Since the improvement of the colonial tribunals and the establishment of Courts of Appeal, particularly in Canada, the business of the Judicial Committee, once very much in arrear, has become less and less. It would tend to uniformity in the law of the empire if the jurisdiction of the Privy Council were merged in that of the House of Lords, and the decisions of the lords would undoubtedly carry more weight in the colonies than those of the Privy Council at present carry. The tendency of recent legislation has been to make the personnel of the Judicial Committee identical with that of the law-lords, and the transfer of jurisdiction might be effected by a very slight constitutional adjustment. Mr. Forster and the friends of confederation might try their hands on this subject."

THE QUEEN v. DOUTRE.

It is a pity for two reasons that this case was carried to the Privy Council. In the first place, it seems that the only question of law was not raised, and that the principal question of fact was almost admitted. Their lordships say:—"It is not matter of dispute that according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit* in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar." And further on, they thus deal with the facts: "It is not maintained that the amount awarded by the learned judge is excessive, if the respondent has a right of action, and that right is not barred by the alleged arrange-

ment of May, 1877." If a member of the Quebec Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit*, and if it be admitted that in the particular case the amount demanded was not excessive, it was scarcely necessary to enquire so elaborately whether Sir Albert Smith's testimony established a special stipulation, or to ventilate Mr. Justice Gwynne's "pardonable error" in mistaking the Act of 1875 for the Petition of Right Act of 1876, and in confounding two things "essentially different—'right' and 'remedy.'"

From another point of view it is to be regretted that this very simple domestic matter should not have been decided in Canada. Taking as exact the points submitted by the appeal, as set forth in the opinion of the Judicial Committee, the judgment is irreproachable, but unfortunately, to to a good judgment a dissertation has been tacked on, which gives rise to considerable difficulty. The London *Law Journal* slyly suggests that "on a subject of so much interest the judgments in the Court of Appeal and the House of Lords would have been doubly interesting." We should then have the opinions, *seriatim*, of judges responsible for their utterances, instead of a rambling note, over which no one but the registrar has an individual influence. It is difficult to suppose that any eminent English lawyer, writing deliberately of the professional disability to sue for fees, should say that it "may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy." It is not more easy to understand the sentence immediately following: "Even if these considerations (public policy) were admitted, their lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the bar alone excepted, can recover their fees by an action at law." Surely if there be reasons of "public policy" which

forbid a barrister suing for his fee, they must exist whether the two branches of the profession be united or not. That is to say, the general practitioner cannot sue for his fee when acting as an advocate, but he may when acting as an attorney. But it is apparent at every line that their lordships were dealing with a subject about which they had forgotten anything they ever knew. The question is as old as the hills, and the difficulty is not one of "public policy" properly speaking, but of the nature of the service. There is no way of measuring the value of intellectual and moral services. This is equally true of the advice of a physician, the consolations of a priest and the advocacy of a lawyer. It has nothing to do with "usage or the peculiar constitution of the English Bar." It existed in Rome, and the law of France is not really very different from that of England. In England the action is peremptorily denied—in France the right of action is admitted and the remedy is practically refused. The whole question was well explained in the case of *Devlin & Tumblety* decided in 1858, 2 L. C. J. p. 182; and this case is not over-ruled by *Amyot & Guy*. R.

THE TIME FOR VACATION.

The *Law Journal* (London) seems to approve of the proposal that the Long Vacation in England shall begin on August 1, (and end on old Michaelmas Day, Oct. 11). This seems to be a reasonable suggestion, and if the time of the year were the only consideration we suppose there are few lawyers who would not welcome the change. Our own Vacation has just been made nine days earlier as well as nine days longer, beginning July 1. Our contemporary says the "abnormal heat" of the weather (80 deg. in the shade) supplies an argument in favour of the proposal. In this "margin of the frozen zone" (*vide American Law Review*), the thermometer as we write (Aug. 21) marks just 91 deg. in the shade and has stood nearly at that point during the best part of seven days; so that our friends of the British Association and tourists from across the border have an opportunity of solving their doubts as to whether the streams and lakes of the country

are ever clear of ice, or whether our broad lands are ever anything but "acres of snow."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, Feb. 8, 1884.

Before TORRANCE, J.

MAJOR V. PARIS.

Procedure—Absentee—Power of attorney.

The production of a general authorization to sue for the recovery of debts due to an absentee is a sufficient compliance with C.C. P. 120, § 7. It is not necessary that the attorneys ad litem be named therein.

The plaintiff, residing at Chicago, had authorized, by a writing produced, two persons named therein, to buy the book debts of F. X. Major, of Montreal, and to sue for the recovery thereof. The action was on notes in favor of said Major.

The defendant moved that the power of attorney be declared insufficient, contending that a special authorization to plaintiff's attorneys was necessary.

The Court held that the power of attorney to collect the debts of Major, which had been filed, was a sufficient compliance with the Code.

Motion rejected.

Trudel & Co. for plaintiff.

J. G. D'Amour for defendant.

SUPERIOR COURT.

MONTREAL, January 28, 1884.

Before RAINVILLE, J.

DORION V. DIETHE, & DIETHE, opposant.

Execution—Sale of moveables—Error in advertisement of sale.

An error in the advertisement of sale of moveables seized, giving a wrong number to the place of sale, does not annul the seizure, but merely makes it necessary to give other and correct notices of sale.

In an advertisement published in a newspaper of a sale of moveables, the number of the house where the sale was to take place was given incorrectly.

The defendant filed an opposition *à fin d'annuler* based on the error in the number.

The Court held the notices to be irregular, but rejected that part of the opposition which asked that the sale be annulled; each party to pay his own costs.

G. A. Morrison for the plaintiff.

N. Durand for the opposant.

U. S. CIRCUIT COURT, N. D. ILL.

UNITED STATES V. BANK OF MONTREAL.

Liability of Bank of Montreal to pay Internal Revenue Tax—Power to establish branch—Intention of Congress as to Banks of Foreign Countries.

1. *As the Bank of Montreal can have no corporate existence here, but only transacts business by comity, its Chicago agency must, for the purposes of the internal revenue law, be considered the same as a private person engaged in the banking business, and pay the tax upon the amount of money it employs in its business, without regard to whether it is technically capital, that is, the fund contributed by its stockholders or not.*
2. *The power of the bank to establish a branch in Chicago, considered.*
3. *It could not have been the intention of Congress to allow banks of foreign countries to send their money here to be loaned and used by an agent for the profit and benefit of such banks, without subjecting them to the same burdens imposed by the law on domestic banks and bankers. — (Chicago Legal News.)*

BLODGETT, J.—This is a suit to recover internal revenue taxes claimed to be due from defendant on the capital employed by defendant in the business of banking, from the 1st of Nov., 1871, to the 1st of December, 1879.

The defendant is a corporation created and existing under the laws of the Dominion of Canada, having its principal place of business in the city of Montreal. Its chartered capital is \$12,000,000 fully paid up, and it has a reserve fund of \$5,000,000, and average deposits of about \$17,000,000.

On the first of November, 1871, it established a branch, or agency, in the city of Chicago,

which has been continued to the present time. At the time this branch or agency was established here, its manager was informed that the sum of \$100,000 had been assigned to his agency as capital.

The business here has been the receiving of deposits, to be paid out on draft or check of the depositors, buying and selling of domestic and foreign exchange and the loaning of money on warehouse receipts for grain and provisions as collateral security, the deposits averaging about \$2,000,000, and the profits on the business transacted here amounting to about \$10,000,000.

The \$100,000 assigned as capital has been treated and known upon the books of the agency as "fixed capital," and the internal revenue regularly paid thereon.

In June, 1881, an examination was had by F. J. Kinney, agent of the Internal Revenue Bureau, of the books and accounts of the agency, from which it was ascertained that a much larger amount of money had been used in the business of this agency than the \$100,000 capital allotted to it, and he reported the amount due for tax on capital, under the second paragraph of section 3408, of the Revised Statutes, which imposes a tax of one twenty-fourth of one per cent per month upon the capital employed in banking, to be \$83,773.56; after this report was received, an assessment was made and warrant issued for the collection of the portion of said tax which had accrued within two years, amounting to \$24,543.88, and the amount of this assessment was paid under protest. This suit is now brought to recover the balance of \$59,229.68 of the tax so ascertained to be due, or reported to be due by examiner Kinney, and which it is claimed accrued between the establishment of the bank December 1st, 1871, and December 1st, 1879. Several defences to the right to recover this money are interposed:

1st. That this Chicago agency is a branch of the parent bank in Montreal, and as such only liable to pay internal revenue taxes on the capital allotted to it by the parent bank, under the last clause of the third paragraph of Sec. 3408.

2nd. That the funds used and loaned here cannot be considered capital of this bank, as

they are sent here for temporary use, and liable to be withdrawn for use elsewhere, at the will of the home management.

3rd. That the funds used here are not a part of the capital of the parent bank, but are part of its surplus funds made up in part, at least, of the profits of this agency or branch.

4th. That most of the funds used by this branch are not employed in the business of banking, as defined in section 3407, Rev. Stat.

The assistant manager of this branch or agency, who was called as a witness on the trial, explained the course of business by saying, "when we see a chance to loan money here to good advantage, we notify the home office at Montreal, and they send it to us if they have it;" and his testimony shows that the average amount of money used for the first five months after this branch was established was over \$400,000 per month; that for the next twelve months it was over \$900,000 per month, and from the time the agency was established there was a steady increase in the business, so that the amount of money employed in the business for the twelve months ending the 31st of May, 1879, averaged \$1,496,635 per month.

It will thus be seen that a large sum of money belonging to the parent bank was constantly employed in its business here; whether the profits made in the business here were retained and used here, or whether those profits were remitted to Montreal as fast as made, and the money to be used here was sent from Montreal as wanted, does not seem to me to be material.

Section 3407 defines a bank and banker as follows: Section 3407.—"Every incorporated or other bank, and every person, firm or company, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker."

Certainly the business carried on by the defendant here must be held to be a banking

business within this definition. It had a "place of business" where credits were opened by the deposit of money subject to be paid or remitted upon draft, check or order, and where bills of exchange were issued and sold. The last clause of the 3rd paragraph of Sec. 3408 reads as follows:—

"In the case of banks with branches, the tax herein provided shall be assessed upon the circulation of each branch severally, and the amount of capital of each branch shall be considered to be the amount allotted to it."

It is contended that the defendant is a bank with branches within the meaning of this provision, and that only the sum of \$100,000 capital was allotted to this branch by the parent bank.

At the time the internal revenue system was adopted, in 1861, there were no national or United States banks, but in several of the States there existed what were called State banks, with power to establish branches. As I now recall the facts from memory such banks existed in Ohio, Indiana, Missouri, and Iowa, and in the charters of these State banks there was a provision for establishing branches and allotting or determining the amount of the capital of such branches, and I am of opinion that this provision as to the taxation of branch banks had special reference to the then existing State banks and their branches, although the language used is comprehensive enough to apply to any future institutions of the same character, whether State or national.

The evident meaning and intent of the whole section 3408 was to assume that the active money employed by an incorporated bank was represented by its capital, and that the capital of a branch bank was the amount which was allotted to it, or which it was permitted to use; and the branch for the purpose of this tax on capital was deemed a separate entity.

Ordinarily what is known as the capital of a bank is the fund paid in by its shareholders on their capital stock, and this forms the basis upon which the business of the bank is conducted. The banks loan this money or use it in the discount of commercial paper in the purchase and sale of ex-

change, or in the cases of bank of circulation, for the purpose of redeeming or securing their current notes. The profits of the business are, as a rule, after payment of expenses, distributed as dividends to shareholders. If for any reason, all or part of the profits are retained by the bank, such retention may be only temporary, and they are liable to be paid out in dividends at any time, so as a basis of this internal revenue tax the paid up capital as a fixed fund was taken—assuming that, as a rule, the capital represented the moneys which the bank used in its business. In this case, however, we have a foreign bank with the control of a very large amount of money establishing an agency here for the loaning of its money. It conducts, through such agency, all the business of a bank; receives deposits, buys and sells exchange, discounts notes and bills and loans money. As the Bank of Montreal can have no corporate existence here, but only transacts business by comity, this agency must, I think, for the purposes of this law, be considered the same as a private person engaged in the banking business, and pay the tax upon the amount of money it employs in its business without regard to whether it is technically capital, that is, the fund contributed by its stockholders, or not. It sends its money here to be used in banking business, taking, perhaps, only that which it has accumulated from its home business, and which has not been divided, or leaving here the profits realised from the business here.

If the defendant has power under its charter to establish branches, that power would only authorize the establishment of branches within the jurisdiction of the sovereignty which created the corporation; that is, it cannot establish a branch with its corporate powers here, but the business it transacts here is more in the nature of an agency than that of a branch; and if any of the funds of the home corporation are sent here and used here in conducting a banking business, they should, in my opinion, pay the tax imposed under the second paragraph of Sec. 3406, as capital employed by a person, in the business of banking.

It could not have been the intention of Congress to allow banks of foreign countries

to send their money here to be loaned and used by an agent for the profit and benefit of such banks, without subjecting them to the same burdens imposed by the law on domestic banks and bankers.

It is further urged that the money used here by the defendant was not its capital, but was part of its surplus or reserve, and the decision of Mr. Justice Nelson in *Mechanics and Farmers Bank v. Townsend*, 5 Blatch. 156, is cited in support of this position. It may be sufficient to distinguish this case from the one at bar to say that the question then under consideration was the meaning of the word "capital" as used in paragraph one of Sec. 79 of the Internal Revenue Act of June 30, 1864, and had application to the amount to be paid for license to do business as a bank or banker; but it does not seem to me the rule given in that case is at all applicable to an agency like this of a foreign bank. If this defendant, being incorporated as a bank in a foreign country, had transacted all its business here, then its capital paid in and forming the basis of its business might be properly held to be the measure of its liability for this tax; but when such a corporation uses its surplus or reserve fund in conducting a banking business in this country, its capital for the purposes of this tax must, I think, be the amount of money it uses from month to month in the business here. It is said this surplus was only temporarily used here, but the proof shows how much was used each month, and the statute imposes a tax of one twenty-fourth of one per cent per month on the money so used. If at the end of a month it had been withdrawn and returned to the defendant in Montreal, all further liability would be at an end.

It is further urged that the business transacted by the defendant here was not a banking business as defined by Sec. 3407, because the money was not advanced or loaned on stocks, bonds, bullion, etc., but was loaned on the pledge of warehouse receipts for grain and provisions. The assistant manager for defendant says in his testimony, "when we lent money, we took a note and the warehouse receipts as collateral. We rely wholly on these collaterals."

Sec. 3407 declares in effect, that every incorporated bank and any firm or company having a place of business, where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check or order, or where money is advanced on bonds or stocks, etc., shall be regarded as a bank or banker. This defendant had a place of business here, where credits were opened and deposits received and paid out on checks, so that it comes within one of the definitions of a bank or banker, and being such, it is liable to pay the tax in question without regard to what security it took for money loaned or advanced. So, also, a person or firm who advanced or loaned money on stocks, bonds, etc., is a banker; but when a banker, that is, one who comes within either of the definitions, loans money on other security than stock or bonds, that does not relieve him from this tax liability as to such business.

Many banks, especially in the older eastern States, only loan money on notes secured by the name of an approved indorser or surety; but if they are banks, it makes no difference what security they take for their loans, they are still liable to this tax.

I therefore conclude that the defendant is liable for the amount of tax claimed in this case, \$59,229.68, with interest at six per cent from the time when such tax accrued. No computation of this interest was made at the time of the trial, but it may be made and submitted.

The proof also shows that the defendant paid \$9,629.82 for taxes on clearing house checks, on which there has been refunded \$2,573.91, leaving a balance yet due of \$7,056.01.

As I understand the proof, after this tax had been paid several years, the commissioner ruled that the banks were not liable to pay on these checks, and refunded what had accrued within two years, but refused to go further back, leaving this balance of \$7,056.01 unpaid; and defendant now insists that this amount should be set off against the taxes now found due.

This is an equitable action, and the inquiry really is, how much is justly due the plaintiff; and I think it is conscionable and right

to deduct this sum of overpaid tax on clearing house checks from the tax on capital, as this claim and counter-claim accrued contemporaneously and out of the same business.

R. S. Tuthill, Dist. Att'y.

Boutelle & Waterman, for Deft.

HIGH COURT OF JUSTICE.

LONDON, May 10, 1884.

Before LORD COLERIDGE, L. C. J., GROVE, J., FIELD, J., STEPHEN, J., and SMITH, J.

REGINA V. MALLOKY.

Evidence—Paper written by prisoner's wife by his direction.

The following case was reserved by the Deputy Chairman of the East Riding Quarter Sessions.

The prisoner was indicted for feloniously receiving certain articles knowing them to have been stolen. He was a marine-store dealer, and it appeared that the stolen articles were such as he might have bought in the lawful exercise of his business. It was not disputed that they had been stolen by the man who brought them to his shop, and the price given by the prisoner for them thus became a material element in the case. With the object of showing that the amount so paid was much less than the real value of the goods, it was proposed to put in a list of the articles bought, with the amount paid by the prisoner for each article, the list being in the handwriting of his wife. When asked about them, he said 'his wife should make out a list,' and she afterwards, in his presence, handed the list to a police officer.

The Court held that the paper was admissible in evidence, as having been made out by the wife by her husband's direction, and handed over in his presence and with his authority.

Conviction affirmed.

THE QUEEN V. DOUTRE.

To the Editor of the LEGAL NEWS:

SIR,—The members of the Judicial Committee appear to assume that there can be no dispute as to Mr. Doutre's right if the case is to be governed by Lower Canadian law, as they decide it is. To this conclusion the

views expressed by the two Lower Canadian members of the Supreme Court no doubt irresistibly led, and hence the fact that the Privy Council have not passed upon the different points which have been so hotly contested of late years in the Province of Quebec.

The real importance of the decision in England, however, lies in the fact that if Mr. Doutré had come before our own Court of Appeal he must have lost his case, and yet the decisions in *Larue & Loranger*, and similar cases, were cited in the Supreme Court as if they favoured the right of counsel in such a case.

The confusion comes from this, that our Lower Canadian Courts admit the right of action of counsel, but they admit it not as the rule, but as the exception. The fallacy was to suppose that our Courts admitted the right absolutely, or at any rate admitted it in a case such as Mr. Doutré's.

Our Court of Appeal holds, no doubt, that professional services may pass beyond the *honorarium* stage, but the only contract so far admitted has been that in which everything has been expressed, and the amount of the fee specially defined by the parties themselves. In particular they have rejected not only indefinite promises of a fee in addition to the amount allowed by the Tariff, but they have considered as prohibited a contract where the fee was to be paid contingently and out of the amount to be recovered. In fact the rule has been to place professional men at the mercy, or, what is more euphonious, make them dependent upon the generosity of their clients. It is true that in a recent case the correctness of the report in *Larue & Loranger* has been questioned, but the remarks of the judges in *Dugdale & The City*, as well as in *Dorion & Brown*, leave no doubt as to the opinion of the majority in the Court of Appeal.

As to the case of *Devlin & The City*, it never was reported, but if the judgment itself is referred to, it will be found that the *condemnant* immediately preceding that quoted by Taschereau, J., in the Supreme Court, rests upon the report of the Finance Committee that Mr. Devlin should receive at least \$2,500.

The truth is that some of our judges have

been influenced, far more than they were aware of, by the feeling so touchingly referred to by Chief Justice Harrison in *McDougall & Campbell*—a weakness to be gloried in as strength by those whose standard of professional duty, if no longer reconcilable with the law as it stands, is at any rate a high and noble one. What I regret is that we should have been deprived—by a misunderstanding as it were—of a carefully prepared *exposé* of the law and the jurisprudence of Lower Canada on the subject of the action of counsel for their fees, an *exposé* which could not but have been interesting, since it must have retraced the numerous and devious courses we have had to go through before reaching the present satisfactory position.

E. B.

A JUDGE'S GHOST STORY.

The following is the account given in the article on "Visible Apparitions," by Messrs. Edmund Gurney and Frederick W. H. Myers, in the July number of the *Nineteenth Century*, referred to *ante*, p. 258:—

One further case we received from Sir Edmund Hornby, late Chief Judge of the Supreme Consular Court of China and Japan, who describes himself as "a lawyer by education, family, and tradition, wanting in imagination, and no believer in miracles." He first narrates how it was his habit at Shanghai to allow reporters to come to his house in the evening to get his written judgments for the next day's paper.

They generally availed themselves of the opportunity, especially one editor of an evening paper. On the day when the event occurred, in 1875 or 1876, I went to my study an hour or two after dinner, and wrote out my judgment. It was then about half past 11. I rang for the butler, gave him the envelope, and told him to give it to the reporter who should call for it. I was in bed before 12. I am a very light sleeper, and my wife a very heavy one. I had gone to sleep, when I was awakened by hearing a tap at the study door, but thinking it might be the butler, I turned over with the view of getting to sleep again. Before I did so, I heard a tap at my bedroom door. Still thinking it might be the butler, who might have something to say, I said, "Come in." The door opened, and, to my surprise, in walked Mr. —. I sat up and said, "You have mistaken the door, but the butler has the judgment, so go and get it." Instead of leaving the room he came to the foot edge of the bed. I said, "Mr. —, you forget yourself. Have the good-

ness to walk out directly. This is rather an abuse of my favor." He looked deadly pale, but was dressed in his usual dress, and was certainly quite sober, and said, "I know I am guilty of an unwarrantable intrusion, but finding that you were not in your study I have ventured to come here." I was losing my temper, but something in the man's manner disinclined me to jump out of bed to eject him by force. So I said, simply, "This is too bad, really; pray leave the room at once." Instead of doing so he put one hand on the footrail and gently, as if in great pain, sat down on the foot of the bed. I glanced at the clock and saw that it was about twenty minutes past one. I said, "The butler has had the judgment since half-past eleven; go and get it." He said, "Pray forgive me; if you knew all the circumstances you would. Time presses. Pray give me a *précis* of your judgment, and I will take a note in my book of it," drawing his reporter's book out of his breast pocket. I said, "I will do nothing of the kind. Go downstairs, find the butler, and don't disturb me—you will wake my wife; otherwise I shall have to put you out." He slightly moved his hand. I said, "Who let you in?" He answered, "No one." "Confound it," I said, "what the devil do you mean? Are you drunk?" He replied, quietly, "No, and never shall be again; but I pray your lordship give me your decision, for my time is short." I said, "You don't seem to care about my time, and this is the last time I shall ever allow a reporter in my house." He stopped me short, saying, "This is the last time I shall ever see you anywhere."

Well, fearful that this commotion might arouse and frighten my wife, I shortly gave him the gist of my judgment in as few words as I could. He seemed to be taking it down in shorthand; it might have taken two or three minutes. When I finished, he rose, thanked me for excusing his intrusion and for the consideration I had always shown him and his colleagues, opened the door, and went away. I looked at the clock; it was on the stroke of half-past one.

(Lady Hornby now awoke, thinking she had heard talking; and her husband told her what had happened, and repeated the account when dressing next morning.)

I went to the court a little before 10. The usher came into my room to robe me, when he said: "A sad thing happened last night, sir. Poor— was found dead in his room." I said, "Bless my soul! dear me! What did he die of, and when?" "Well, sir, it appears he went up to his room as usual at 10 to work at his papers. His wife went up about 12 to ask him when he would be ready for bed. He said: 'I have only the Judge's judgment to get ready, then I have finished.' As he did not come, she went up again, about a quarter to 1, to his room and peeped

in, and thought she saw him writing, but she did not disturb him. At half-past 1, she again went to him and spoke to him at the door. As he did not answer, she thought he had fallen asleep, so she went up to arouse him. To her horror he was dead. On the floor was his note-book, which I have brought away. She sent for the doctor, who arrived a little after 2, and said he had been dead, he concluded, about an hour. I looked at the note-book. There was the usual heading:

"In the Supreme Court, before the Chief Judge.

—v.—
"The Chief Judge gave judgment this morning in this case to the following effect"—and then followed a few lines of undecipherable shorthand.

I sent for the magistrate who would act as coroner, and desired him to examine Mr. —'s wife and servants as to whether Mr. — had left his home, or could possibly have left it without their knowledge, between eleven and one on the previous night. The result of the inquest showed he died of some form of heart disease, and had not, and could not, have left the house without the knowledge of at least his wife, if not his servants. Not wishing to air my "spiritual experience" for the benefit of the press or the public, I keep the matter at the time to myself, only mentioning it to my Puisné Judge and to one or two friends; but when I got home I asked my wife to tell me as nearly as she could remember what I had said to her during the night, and I made a brief note of her replies and of the facts.

As I said then, so I say now—I was not asleep, but wide awake. After a lapse of nine years my memory is quite clear on the subject. I have not the least doubt I saw the man—have not the least doubt that the conversation took place between us.

I may add that I examined the butler in the morning—who had given me back the MS. in the envelope when I went to the court after breakfast—as to whether he had locked the door as usual, and if any one could have got in. He said that he had done everything as usual, adding that no one could have got in, even if he had not locked the door, as there was no handle outside—which there was not. I examined the coolies and other servants, who all said they opened the door as usual that morning—turned the key and undid the chains, and I have no doubt they spoke the truth. The servants' apartments were separated from the house, but communicated with by a gallery at the back, some distance from the entrance-hall.

The reporter's residence was about a mile and a quarter from where I lived, and his infirmities prevented him from walking any distance except slowly; in fact, he almost invariably drove.

The Legal News.

VOL. VII. AUGUST 30, 1884. No. 35.

THE FRENCH DIVORCE ACT.

The new law, as our readers may have observed, has provided the courts with the semblance of a vast amount of work. Within a fortnight after the measure became law several thousand suits were set down on the cause list in Paris alone. The explanation of this is the fact that all couples who have been judicially separated for more than three years, can now have the decree made absolute as a divorce on a simple application from either of them. As there have been over a hundred thousand judicial separations in France during the last twenty years it is obvious that the number of parties qualified for divorce must be very large, but we presume that these cases will be disposed of without much delay or difficulty.

The law itself differs essentially from that which prevails in England. It goes even further than our own law, and makes it easier to obtain a divorce in France than it is to obtain a judicial separation in this Province. One of the leading features is that the infidelity of the husband is put on the same footing as the misbehaviour of the wife. Further, if a husband or wife is sentenced to a *peine infamante*, *c. g.*, penal servitude or transportation, the consort has simply to prove the conviction in order to obtain a divorce. Besides the ordinary cases of cruelty, habitual drunkenness is now a ground of divorce. So, too, a wife has her remedy where her husband has been guilty of disgraceful conduct, such as cheating at cards, or the more vulgar offence of theft. But, as we have remarked, the law goes even further, and enacts that the fact of a husband or wife "habitually insulting the relatives of the other" is sufficient to support the claim of the aggrieved consort to a divorce. This clause, it is said, has been styled by the Parisians a law "for the protection of mothers-in-law," and it certainly makes that dreaded relative omnipotent to disturb and separate couples at her pleasure.

The procedure is to be that which has been followed hitherto in applications for judicial separation. No special court is created, but the cases are to be tried in the ordinary civil courts by three judges without a jury. Provision is made for an attempt at reconciliation. After a petition has been filed, the parties will be summoned before the presiding judge, who will endeavour to settle the conjugal difficulty, if the case admits of it, and he may even adjourn the hearing for a twelve month where it seems desirable. The provisions of the Act are in some respects so novel and extraordinary that it cannot fail to have an important influence upon society.

A QUESTION OF COSTS.

A case of *Ginger v. Beale* is reported in the *Times* (London) of Aug. 12, which exceeds almost anything we have heard in connection with fights for costs. Judgment was obtained against three parties on a bill of exchange. The plaintiff made a claim against Beale, one of them, for £5 10s. for costs, and the amount was disputed. The matter was carried in succession to the Master, then to a Judge in Chambers, then to another Judge in Chambers, and finally the Taxing Master struck off 5s. 8d. Mr. Beale's counsel then applied in the Queen's Bench Division for his costs, as he had succeeded on taxation. Questions of costs are proverbially perplexing, but the following extract from the report shows the spirit in which the English Court dealt with the difficulty:—

LORD COLERIDGE.—Succeeded after four appeals in striking off 5s. 8d.—something more than a shilling by each proceeding! Well, if there is an Act of Parliament which says that you must have your costs, why, then you shall have them, not otherwise.

MR. JUSTICE FIELD.—I offered to settle it at the time, and could have done so in two minutes. But your client insisted on taxation. I thought I had disposed of the case.

Mr. Pitt-Lewis appeared for the plaintiff, but

The Court, without hearing him, dismissed the application, and made the applicant pay all the costs.

COUNTY COURT JUDGES.

It appears that the rank and precedence of Judges of County Courts in England and Wales have not been declared or defined by due authority. To supply the omission a warrant has been issued, which appears in

the *London Gazette* of the 8th instant, in which the rank of these functionaries is defined as follows:—"Know ye, therefore, that in the exercise of Our Royal Prerogative, We do hereby declare Our Royal will and pleasure that in all times hereafter the Judges of County Courts in England and Wales shall be called, known, and addressed by the style and title of 'His Honour' prefixed to the word 'Judge' before their respective names, and shall have Rank and Precedence next after Knights Bachelors."

EXHIBITION OF PORTRAIT.

In the case of *Dumas v. Jacquet* the First Chamber of the Civil Tribunal of Paris, by a judgment delivered June 21, enjoined the public exhibition of a picture in which the artist had represented Alexandre Dumas, the novelist, as a "Marchand Juif." The following is the judgment as published in the *Law Journal* (London):—

"Seeing that it is not denied, and that it follows otherwise from the documents in the cause, that Jacquet yielded to a feeling of personal resentment when, in February, 1882, he sent to the exhibition of Water Colour Painters, and publicly exhibited in the galleries of Georges Petit, under the title 'Marchand Juif,' a picture which represented Alexandre Dumas habited in a caftan and keeping a bazaar; that Alexandre Dumas would have been entitled to bring an action even had the defendant reproduced his features without any malicious intention and simply because his authority had not been obtained; that still more his claim is well founded when the artist has manifestly given way to a feeling of disparagement with the object of attacking his reputation;

"Seeing that in these circumstances Jacquet ought to be forbidden to exhibit publicly the picture in question in any manner whatever;

"That this injunction is sufficient, so far, to preserve the rights of the plaintiff without ordering at the present moment, as Alexandre Dumas claims, the destruction of the picture, in case the injunction should be disregarded, or granting the other prayers and conclusions of the claim;

"The tribunal forbids Jacquet and his agents to send for public exhibition the

'Marchand Juif' in any manner whatever, and to allow it to appear at a sale or public exhibition under any title whatever, reserving to Alexandre Dumas his rights and remedies in case the injunction is contravened. It declares, besides, that the plaintiff is not well sustained in the rest of his prayer requiring in particular the insertion of the judgment in twenty newspapers."

The same Court some time ago gave judgment in *Dwerdy v. Zola*, enjoining a novelist from giving to a character in a novel the name of a real person.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

Before DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

BOISSEAU et al. (defts. below), Appellants, and THIBAUDREAU et al. (plffs. below), Respondents.

Payments made in fraud of creditors—C. C. 1036—Knowledge of insolvency.

A creditor who alleges that his debtor while insolvent has made payments to another creditor knowing his insolvency, has a right under C. C. 1036, to sue the latter in his own name, and to ask that such sums be paid into Court for the benefit of the creditors according to their respective rights. The relation of the parties and other facts established in the present case, proved the creditor's knowledge of the debtor's insolvency.

The respondents who were creditors to an amount exceeding \$4,000 of an insolvent firm of Chaput & Massé, complained that Boisseau & Frère (the appellants) had received from Chaput & Massé a sum of \$3,824 while the latter were insolvent, and the object of the action was to have Boisseau & Frère ordered to pay this money into court for the benefit of Chaput & Massé's creditors generally.

The appellants demurred to the action, on the ground that the respondents were not entitled to come into court individually and (without alleging any transfer to themselves of the rights of the other creditors, or any authorization by the creditors) claim to have

the payments set aside, and the money brought into court for the benefit of the creditors generally. The appellants also pleaded to the merits that they had no opportunity of knowing, and did not in fact know that Chaput & Massé were insolvent before the date of their assignment; that at the very time referred to (February, May and June, 1882), the appellants Boisseau & Frère themselves made considerable advances to Chaput & Massé in the belief that they would be able to meet their engagements.

The court below (Mathieu, J., in the Superior Court, Montreal), maintained the action in part. The facts, as they appeared to the court, were that in the beginning of 1881, the defendants Boisseau & Frère, wishing to encourage Chaput and their relative Massé, advised them to form a partnership and commence business in Montreal. The partnership was formed, and by clause 7 of the deed it was stipulated that the books of Chaput & Massé should be regularly kept, and that Boisseau & Frère should have access to all the accounts and transactions. The book-keeper of Chaput & Massé, one Noel, was also book-keeper to Boisseau & Frère. From April, 1881, up to 28th December, 1881, Chaput & Massé bought goods from Boisseau & Frère to a considerable amount. They also bought goods from J. G. Mackenzie & Co., from March, 1881, to November, 1881, Boisseau & Frère becoming responsible to the extent of about \$1,200. In January, 1882, Chaput & Massé made an inventory of their affairs by which they showed assets \$15,386.90 and liabilities \$16,489.68, leaving a deficiency of \$1,102.78, or rather of \$1,600, as certain items of assets had been counted twice over. The court was of opinion from the relations between the parties that Boisseau & Frère must have known of the insolvency of Chaput & Massé in May, June and July, 1882. By article 1036 of the code, every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount received, for the benefit of the creditors according to their respective rights. As it was proved that Chaput & Massé were insolvent when the payments were made, and as Bois-

seau & Frère were aware of the insolvency, the article applied, and the action was maintained to the extent of \$1,490. The payments made to J. G. Mackenzie & Co., to pay liabilities for which Boisseau & Frère were endorsers were not shown to have been requested by Boisseau & Frère, and the action was dismissed as to this part. The appeal was by the defendants from this judgment.

It was contended on the part of the appellant that Article 1036 above cited applies only where the insolvency is open and notorious. The article says the creditor may be compelled to restore the amount. This indicated that the legislature did not intend to make an absolute rule, but on the contrary wished to give the court the power of appreciating the circumstances and ordering the money to be restored only where fraud is apparent or at least strongly presumed. On the evidence, which is voluminous, it was submitted that fraud was not established. The stipulation that Boisseau & Frère should have access to the books of Chaput & Massé had in view the case of difficulties arising between the partners, and as a fact Boisseau & Frère were not aware of the transactions of the other firm.

It was argued by the respondents that the insolvency of Chaput & Massé and the knowledge of that fact by the appellants were clearly established; that article 1036 applied, and that the judgment was, therefore, correct.

RAMSAY, J. This is an action brought against the members of the insolvent firm of Chaput & Massé and the members of the firm of Boisseau & Frère, creditors of Chaput & Massé, to set aside certain payments of the firm of Chaput & Massé to Boisseau & Frère as being made in fraud of the creditors of Chaput & Massé, and to compel Boisseau & Frère to pay into court the sums so received by them, and for other purposes. The judgment ordered Boisseau & Frère to pay back \$1,490 to be distributed according to the rights of the creditors of the insolvent firm. Boisseau & Frère appealed, and contend that there is no such action known to the law, and that the respondents can only set up the extent of their interest and have the payments set aside in so far as it affects them.

It would be impossible to presume that in a system of law based on equity like ours, there should be any express rule taking away the right to such an action as this. What the respondents ask is the exercise of their own right, and to say that they should ask to be paid by privilege is to contend that they should ask more than they are entitled to, at all events since the repeal of the insolvent act. Of course they might be disinterested, and their action be thus defeated.

The only question, then, is one of evidence. Is it proved that at the time of the payments referred to Chaput & Massé were insolvent? If so, did Boisseau & Frère know it?

As to the first question, there is no doubt that they were insolvent from the time of the inventory at the beginning of 1882. As to the knowledge of Boisseau & Frère it seems to be established in the only way in which it is usual to prove a guilty knowledge. It is proved by inductions or deductions of different degrees, and when sufficiently strong to remove all reasonable doubt it forms complete proof. Now here we have the relation of the parties,—the agreement that Boisseau & Frère should supply them, that Boisseau & Frère should have access to their books, that they took the means to exercise this power, that when events showed that Chaput & Massé were insolvent the supplies ceased and the payments increased solely to the discharge of Boisseau & Frère. There is not an attempt to answer this.

The judgment is, therefore, confirmed.

Judgment confirmed.

R. & L. Laflamme, for the Appellants.

Mercier, Beausoleil & Martineau for the Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

Before DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

PINSONNAULT (plff. below), Appellant, and HEBERT et al. (defts. below), Respondents.

Action en réintégration—Proof of possession.

The appellant brought an action en réintégration in the court below, complaining that the respondents (defendants) had taken pos-

session of a certain immoveable belonging to him, and the appellant asked to be maintained in possession of the immoveable, and that the respondents be compelled to pay him \$400 damages.

The defence was to the effect that David Hebert's wife, with the heirs of her brother Joseph Girardin, owned a strip of the immoveable in question, 24 feet wide, and always had the use of it as a passage across the appellant's land.

The court below dismissed the action.

DORION, C. J. The action is en réintégration. This is an action which the party has when he has been dispossessed. But in this case in the first place the appellant has not been dispossessed, and in the next place the evidence is contradictory. The dispute is as to a piece of land which was formerly a road. There was a ferry there, and the road led to it. Upon the conflict of evidence we are not disposed to reverse.

RAMSAY, J. This is an action de réintégration brought by the owner of a lot of land on the bank of the river Richelieu, complaining of the invasion of his possession of another piece of land forming part of an old road leading from the front road to the river, and being the continuation of a road called the "Grande Ligne."

The two respondents severed unnecessarily in their defence, which amounts to this: that David Hebert's wife is the owner of this piece of road, and that the plaintiff is not only not the proprietor of it, but that his title excludes the bit of land in question, and that appellant had never any exclusive possession of the road.

The judgment of the court below seems to have turned on this, that neither of the parties had established a sufficient possession *animo domini*, and sent them to discuss the difference between them *au pétitoire*. The appellant feels aggrieved by this judgment and contends that in all cases the court must decide between two parties whose possession is the better. The authority cited by appellant does not say that; but "*que deux possessions égales et de même nature ne peuvent concourir sur le même objet, l'une repoussant nécessairement l'autre, que la possession est exclusive*," etc. This is obvious; but it is not

less clear that of two parties it may be that neither has possession.

It is evident by his own testimony that David Hebert has no possession. He did not put up the fence, and he did not know who put it up, and the fitful and occasional use of this lane to the river is no indication of a possession *animo domini*.

The next question is—has the appellant such a possession? I think not, his possession was neither continuous nor even apparent. I am to confirm.

Judgment confirmed.

E. Z. Paradis for Appellant.

S. Pagnuelo, Q. C., counsel.

Beique & McGoun for Respondent.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before SICOTTE, TORRANCE, RAINVILLE, JJ.

TURCOTTE v. BRISSETTE dit COUBCHENE.

Malicious prosecution.

The inscription was from a judgment of the Superior Court, district of Richelieu (Gill, J.), July 7, 1883.

TORRANCE, J. The demand here was for damages for a malicious criminal prosecution.

The plaintiff was defendant in a case in which the Sheriff had seized land which he had been unable to sell for want of bidders. Some months afterwards the defendant bought a small quantity of wood off this land from Turcotte for the price of \$3. He cut the wood and was then threatened with proceedings for contempt in the case in which Turcotte was defendant, at the suit of the plaintiff. Alarmed, he and his brother, similarly situated and threatened, paid the lawyer of the plaintiff in the other suit \$25 each. They then turned round upon Turcotte and threatened him with criminal proceedings on the charge that the sum of \$3, paid by them to Turcotte, had been obtained from them by false pretences. They endeavored to obtain a cow and horse from his father in settlement, and, failing, lodged an information which led to an indictment and trial before a petit jury in the Court of Queen's Bench.

The Court below has found that plaintiff had ground for claiming damages, and gave

him \$75 and full costs. It found that the prosecution was malicious and without probable cause. I think so, too. It was a malicious and spiteful abuse of the process of the Criminal Court, in order to extort money.

Judgment confirmed.

A. Germain for plaintiff.

E. U. Piché for defendant.

COUR SUPÉRIEURE.

MONTREAL, 4 octobre 1877.

Coram TORRANCE, J.

JONES v. ALBERT, et BERTRAND, opposante.

Saisie-gagerie—Insaississabilité—Sous-bail.

Jugé—Que même lorsque le bail principal contient une prohibition de sous-louer, un sous-locataire peut former opposition à la saisie par le propriétaire de ses meubles qui sont déclarés insaisissables par l'article 556 du C. P. C.

Le demandeur en cette cause avait loué une maison à un nommé Albert et ce dernier, quoique la chose lui fut prohibée par son bail, avait sous-loué une partie de cette maison à l'opposante. Sur une saisie-gagerie prise par Jones, tous les meubles de l'opposante furent saisis comme garnissant les prémisses. Mais, cette dernière fit une opposition réclamant les meubles déclarés non saisissables par l'article 556 C. P. C.

Sur contestation de l'opposition,

La Cour a maintenu les prétentions de l'opposante, et main-levée fut accordée de la saisie quant aux dits effets insaisissables. Le surplus de l'opposition fut renvoyée, chaque partie payant ses frais.

Doherty & Doherty pour le demandeur.

T. & C. C. de Lorimier pour l'opposante.

(J. J. B.)

COUR SUPÉRIEURE.

MONTREAL, 29 novembre 1877.

Coram JOHNSON, J.

GIROUX v. NORMANDIN.

Décharge—Interprétation—Ambiguïté.

PER CURIAM. L'action du demandeur est basée sur un acte d'obligation du 18 avril 1874, consenti par le défendeur en sa faveur. Le demandeur demande maintenant le paiement de la balance due en vertu de cet acte,

savoir : \$148.63 avec intérêt et frais. Le défendeur plaide paiement. La réponse au plaidoyer reconnaît (comme fait aussi la déclaration) le paiement de \$261.37 par les mains d'Olivier Berthelance. Le demandeur produit une quittance du 16 avril 1873 par les exécuteurs de Berthelet, qui montre qu'ils payèrent Giroux \$40 "pour obtenir sa décharge du dit Normandin." Giroux accepta ce paiement pour ce but. Il donna cette quittance aux exécuteurs dans ce but. Mais on lui demande quel but? Pour obtenir sa décharge du dit Normandin; ceci est ambigu, et peut vouloir dire que Giroux était le débiteur intéressé à obtenir la décharge de Normandin; mais ces mots interprétés dans la supposition que cette somme était la balance due sur la dette principale, forment une expression inexacte, mais non inintelligible; car il n'y a rien pour faire supposer que Giroux fut le débiteur de Normandin, et il est certain au contraire, que Normandin était le débiteur de Giroux. Conséquemment un paiement fait par Normandin équivaut en droit à un paiement fait par lui-même, et la décharge de Giroux est suffisante. Il eût été plus exact, sans doute, de dire "pour obtenir sa décharge envers Normandin." Le plaidoyer de paiement est donc prouvé, et l'action déboutée avec frais.

Duhamel & Cie. pour le demandeur.

DeBellefeuille & Turgeon pour le défendeur.
(J. J. B.)

COUR DE CIRCUIT.

MONTRÉAL, 6 mai 1876.

Coram JOHNSON, J.

MABOIS V. DAME DESLAURIERS.

Renonciation à insaisissabilité—Bail—Illégalité. Jugé—Que la clause insérée dans un bail par laquelle le locataire renonce au bénéfice que la loi lui garantit de l'insaisissabilité de ses meubles, en faveur de son locateur est illégale.

Le 9 mars 1876, le demandeur fit émaner une saisie-gagerie et fit saisir tous les biens de la défenderesse, même ceux déclarés insaisissables par la loi, sur le principe que par le bail passé entre les parties, la défenderesse s'était départie de l'exemption de saisie que lui accordait la loi sur certains de ses meubles.

La défenderesse plaide que cette renonciation était illégale et immorale; qu'elle avait été forcée d'y consentir, ne pouvant trouver à cette époque d'autre logis; qu'elle exposait la défenderesse et sa famille à rester exposées aux rigueurs des saisons sans les choses nécessaires à la vie.

La Cour maintint les prétentions de la défenderesse, alléguant qu'il n'y avait rien d'odieux comme d'enlever à un pauvre malheureux pendant nos rigoureux hivers, le seul lit où repose sa famille et seul poêle qui réchauffe sa maison.

Théo. Bertrand pour le demandeur.

Chs. Thibault pour la défenderesse.

(J. J. B.)

INDIANA SUPREME COURT.

December, 1883.

POMEROY V. STATE.

Indecent assault upon patient by physician—Competency of testimony of prosecutrix.

The accused, a physician, while examining the person of a female patient believed to be suffering from a disease of the womb, had carnal connection with her. There was no evidence of consent upon her part obtained by fraud or otherwise. Held, that the accused was guilty of rape.

At the trial the female assaulted, though of weak mind, and an epileptic, was permitted to testify for the state. Held, no error.

Howk, J. The appellant, Pomeroy, was indicted for rape. The indictment charged "that Mark Pomeroy, on the 8th day of October, 1881, at and in the county of Gibson, and State of Indiana, did then and there unlawfully, feloniously and violently make an assault in and upon one Rebecca R. Reavis, a woman then and there being, and did then and there unlawfully, feloniously, violently, forcibly and against her will, ravish and carnally know her, the said Rebecca R. Reavis, contrary to the form of the statute, &c.

A verdict was returned finding him guilty as charged. His motion for a new trial having been overruled, and his exception saved to such ruling, the Court ordered judgment against him in accordance with the verdict.

In this Court, the only error assigned by

the appellant is the overruling of his motion for a new trial. In this motion the following causes were assigned by appellant for such new trial: "(1) The verdict is contrary to law. (2) Verdict contrary to evidence. (3) Verdict contrary to law and evidence. (4) Error of law occurring at the trial of the cause, in this, to wit, the Court permitted Rebecca R. Reavis to be examined as a witness on behalf of the State, she being incompetent to testify, for want of mental capacity; and to the allowing her to testify the defendant objected, but the Court overruled the objection.

The record of the cause discloses the following facts: In October, 1881, James Reavis and his wife Margaret, were living on a farm in the eastern part of Gibson county, in this State. Their daughter, Rebecca, was then 22 years of age, large and stout, "but had been affected with epileptic fits since she was a year old, which came oftener and harder the older she got." The natural tendency and effect of these oft-repeated fits of epilepsy were to produce what the appellant himself calls in his motion for a new trial, her "want of mental capacity and imbecility."

On the 8th of October, 1881, in the afternoon, the appellant Pomeroy, in company with one Patterson, went to the farm house of Reavis. Pomeroy was an itinerant doctor, "travelling from place to place," and was an utter stranger to the Reavis family. In a private interview with the parents Pomeroy said to them: "I am a physician, and have heard about the affliction of your daughter. I have bought property at Oakland city, and I am going to build a hospital on it to treat cases like hers, and have already secured one young lady to treat, and have called to see about treating your daughter." Rebecca's parents answered that she had been under the treatment of a good many doctors, none of whom had done her any good. To this Pomeroy replied: "Yes, but the physician is now come who will revive your drooping spirits and cure your daughter." He then asked to see Rebecca, and said in the presence of her mother he would have to examine her, and put his hand up under her clothes for that purpose. She objected

to such an examination, but her mother told her that she must let him examine her. After the examination Pomeroy declared that Rebecca "had a terrible womb disease, and was losing her mind." Her parents then employed him to cure her, and he and his driver stayed all night at Reavis' house. The next morning Pomeroy took Rebecca into a private room, and, while pretending to make a further examination of her person, succeeded in having sexual intercourse with her. She made no outcry at the time, but after Pomeroy had gone, her mother found her crying, and she then complained to her mother that he "had committed an outrage upon her." Shortly afterwards Pomeroy was arrested upon the charge for which he was indicted, tried and convicted in this case.

The bill of exceptions appearing in the record fails to show that appellant objected or excepted, on any ground, to the competency of Rebecca, a witness for the State. Therefore the only question presented is this: is the verdict of the jury sustained by sufficient legal evidence?

The offence of which the appellant was convicted is defined by Sect. 1917, Rev. Stat. 1881: "Whoever unlawfully has carnal knowledge of a woman, forcibly, against her will * * * is guilty of rape," &c. On behalf of the appellant, it is earnestly insisted that the evidence wholly fails to show that he had carnal knowledge of Rebecca Reavis "forcibly, against her will." Whether the carnal knowledge was had forcibly, against her will, or not, would seem to be a question of fact for the jury, rather than of law. We are of opinion, however, that the jury were justified by the evidence in finding, as they must have done, under the instructions of the Court, that the carnal knowledge was had forcibly and against the will of the prosecuting witness. The evidence wholly fails to show that Rebecca ever consented to, or ever had knowledge of, the act of sexual intercourse, until after it was fully accomplished. In such a case, the force required by the Statute is in the wrongful act. Thus in 2 Bishop Crim. Law (7th Ed.) § 1120, it is said: "Whenever there is a carnal connection and no consent in fact, fraudulently obtained or otherwise, there is evidently in

the wrongful act itself, all the force which the law demands as an element of the crime."

The evidence tends to show that the appellant, as a physician, informed Rebecca and her mother that the former was suffering from a terrible womb disease, and was losing her mind. If the jury believed, as they might well have done under the evidence, that the appellant, as a physician, obtained possession and control of Rebecca's person, under her mother's command, for the purpose of making a further examination of her alleged disease of the womb, and not for the purpose of sexual intercourse, and that she never, in fact, gave her consent, through fraud or otherwise, to the sexual connection, then, it seems to us, that the case in hand falls fairly within the doctrine declared in *Queen v. Flatery*, 2 Q. B. D. 410, decided in 1877, and that the appellant was lawfully convicted of the crime of rape. In the case cited, as in this, the defendant professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, like the prosecutrix in this case, was 'subject to fits,' and she and her mother consulted the defendant in regard to her case, and informed him of her condition. The defendant, as in this case, made an examination of the person of the prosecutrix, and advised that a surgical operation be performed, and under the pretence of performing it, had carnal connection with her. It was held by the court that the prisoner was guilty of rape. Kelly, C. B., said: "It is plain that the girl only submitted to the defendant's touching her person, in consequence of the fraud and false pretences of the prisoner, and that the only thing that she consented to was the performance of the surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother, was the operation which had been advised; sexual connection was never thought of by either of them. And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation. In other

words, she submitted to a surgical operation and nothing else. It is said, however, that having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know of no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is, therefore, not within the authority of those cases which have been decided, decisions which I regret, that, where a man by fraud induces a woman to submit to sexual connection, it is not rape." In the same case, Mellor, J., also said: "It is said that submission is equivalent to consent, and that here there was submission. But submission to what? Not to carnal connection. The case is exactly within the words of Wilde, C. J., in *Reg. v. Case*, 1 Den. C. C., at p. 582: 'She consented to one thing, he did another materially different, on which she had been prevented by his fraud, from exercising her judgment.'"

In *People v. Crosswell*, 13 Mich. 427, after citing some decisions both in England and in this country, to the effect that if the woman's consent is obtained by fraud the crime of rape is not committed, Cooley, J., said: "But there are some cases in this country to the contrary, and they seem to us to stand upon much the better reason, and to be more in accordance with the general rules of criminal law. *People v. Medcalf*, 1 Whart. C. C. 378, and note 381, *State v. Shepherd*, 7 Conn. 54. And in England where a medical practitioner had knowledge of the person of a weak-minded patient, on pretence of medical treatment, the offence was held to be rape. *Reg. v. Stanton*, 1 C. & K. 415. The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman, when her consent is obtained by fraud, than when it is extorted by threats or force."

In the case at bar we are of opinion that the verdict of the jury was fully sustained by the evidence appearing in the record, and that it was not contrary to, but in strict accordance with the law applicable to such evidence. The Court committed no error, therefore, in overruling appellant's motion for a new trial.

Judgment affirmed.

The Legal News.

VOL. VII. SEPTEMBER 6, 1884. No. 36.

THE BOUNDARY CASE.

The following is the text of the decision in this matter:—

At the Court at Osborne House, Isle of Wight, the 11th day of August, 1884.

PRESENT: THE QUEEN'S MOST EXCELLENT MAJESTY, HIS ROYAL HIGHNESS THE PRINCE OF WALES, LORD PRESIDENT, LORD STEWARD, EARL GRANVILLE, EARL OF NORTHBROOK, SIR T. ERSKINE MAY, SIR A. COOPER KEY.

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 22nd of July last past in the words following, viz.:

Your Majesty having been pleased by your Order in Council of the 28th June, 1884, to refer unto this Committee the humble Petition of Oliver Mowat, Your Majesty's Attorney-General for the Province of Ontario as representing that Province and Jas. Andrews Miller, Your Majesty's Attorney-General for the Province of Manitoba as representing that Province in the matter of the boundary between the Provinces of Ontario and Manitoba in the Dominion of Canada, between the Province of Ontario of the one part and the Province of Manitoba of the other part, setting forth that a question has arisen and is in dispute between the Provinces of Ontario and Manitoba respecting the western boundary of the Province of Ontario, and it has been agreed between those Provinces to submit such question to Your Majesty in Council for determination: the following Special Case has accordingly been agreed upon between the petitioners as representing the two Provinces aforesaid:—

"Special Case.

"The Province of Ontario claims that the western boundary of that Province is either (1) the meridian of the most north-westerly angle of the Lake of the Woods, as described in a certain Award made on the 3rd August, 1878, by the Hon. Chief Justice Harrison, Sir Edward Thornton and Sir Francis Hincks, or (2) is a line west of that point.

"The Province of Manitoba claims that the boundary between that Province and the Province of Ontario is (1) the meridian of the confluence of the Ohio and Mississippi Rivers, or (2) is that portion of the height of land dividing the waters which flow into Hudson's Bay from those which empty into the valley of the Great Lakes, and lying to the west of the said meridian line.

"It has been agreed to refer the matter to the Judicial Committee of Her Majesty's Privy Council, and an appendix has been prepared containing the materials agreed to be submitted with this Case for the adjudication of the dispute; each and every of the particulars in the said appendix is submitted *quantum valet*, and not otherwise.

"In addition to the particulars set forth in the appendix, any historical or other matter may be adduced, which, in the opinion of either party, may be of importance to the contention of such party, and (subject to any rule or direction of the Judicial Committee in that behalf), such additional matter is to be printed as a separate Appendix by the party adducing the same and copies are to be furnished at least 10 days before the argument.

"The book known as the Book of Arbitration Documents, may be referred to in the argument for the purpose of showing in part what materials were before the Arbitrators.

"It is agreed that in the discussion before the Judicial Committee of the Privy Council reference may be made to any evidence of which judicial notice may be taken, or which (having regard to the nature of the case and the parties to it) the Privy Council may think material and proper to be considered; whether the same is or is not contained in the printed papers.

"The questions submitted to the Privy Council are the following:—

"(1) Whether the Award is or is not, under all the circumstances binding?

"(2) In case the Award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said Provinces?

"Whether, in case legislation is needed to make the decision on this case binding or effectual, Acts passed by the Parliament of

Canada and the Provincial Legislatures of Ontario and Manitoba, in connection with the Imperial Act 34 & 35 Vict., cap. 28, or otherwise, will be sufficient, or whether a new Imperial Act for the purpose will be necessary.

"O. MOWAT,
Atty.-Gen'l. of Ontario.
"JAMES A. MILLER,
Atty.-Gen'l. of Manitoba."

"And humbly praying that Your Majesty in Council will be pleased to take the said Special Case into consideration, and that the said Special Case may be referred by Your Majesty to the Lords of the Judicial Committee of the Privy Council to report thereon to Your Majesty at the Board, and that such order may be made thereupon as to Your Majesty shall seem meet. The Lords of the Committee in obedience to Your Majesty's said Order of Reference have taken the said humble Petition and Special Case into consideration, and having heard Counsel for the Province of Ontario and also for the Province of Manitoba, their Lordships do this day agree humbly to report to Your Majesty as their opinion—

"1. That legislation by the Dominion of Canada as well as by the Province of Ontario was necessary to give binding effect as against the Dominion and the Province to the award of the 3rd of August, 1878, and that as no such legislation has taken place, the award is not binding.

"2. That nevertheless, their lordships find so much of the boundary lines laid down by that award as relate to the territory now in dispute between the Province of Ontario and the Province of Manitoba to be substantially correct, and in accordance with the conclusions which their lordships have drawn from the evidence laid before them.

"That upon the evidence their lordships find the true boundary between the western part of the Province of Ontario and the south-eastern part of the Province of Manitoba to be so much of a line drawn to the Lake of the Woods, through the waters eastward of that lake and west of Long Lake which divide British North America from the territory of the United States, and thence through the Lake of the Woods to the most northwestern point of that lake as runs northward from

the United States boundary, and from the most northwestern point of the Lake of the Woods a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lac Seul or the Lonely Lake, whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg, and their lordships find the true boundary between the same two provinces to the north of Ontario and to the south of Manitoba, proceeding eastward from the point at which the below-mentioned line strikes the middle line of the course of the river last aforesaid to be along the middle line of the course of the same river (whether called by the name of the English River or as to the part below the confluence by the name of the River Winnipeg) up to Lac Seul or the Lonely Lake, and thence along the middle line of Lac Seul or the Lonely Lake to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves, until it reaches a line drawn due north from the confluence of the Rivers Mississippi and Ohio which forms the boundary eastward of the Province of Manitoba.

"3. That without expressing an opinion as to the sufficiency or otherwise of concurrent legislation of the provinces of Ontario and Manitoba, and of the Dominion of Canada (if such legislation should take place), their lordships think it desirable and most expedient that an imperial act of parliament should be passed to make this decision binding and effectual."

HIS MAJESTY having taken the said report into consideration, was pleased by and with the advice of her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution. Whereof the Governor-General of the Dominion of Canada, the Lieutenant-Governor of the Province of Ontario and the Lieutenant-Governor of the Province of Manitoba, and all other persons whom it may concern, are to take notice and govern themselves accordingly. C. L. FLEMING.

OUR ARCHIVES.

We are permitted to publish the following important letter which has been addressed by Mr. Girouard, Q.C., M.P., to the attorney-general of Quebec:—

30 AOÛT, 1884.

MONSIEUR LE PROCUREUR-GÉNÉRAL,—Je viens vous remercier de la permission que vous m'avez accordée d'avoir un volume à la fois des archives de la Juridiction Royale de Montréal de 1720 à 1759. Cette période de son existence couvre 57 gros volumes, 31 à 78, contenant 1,000 à 1,200 feuillets chaque. Les archives de 1651 à 1720, comprenant la période de la Justice Seigneuriale et vingt-quatre années de justice Royale, forment 30 volumes.

Vous ne pouvez vous former une idée de l'importance de ces archives au point de vue de l'histoire politique et judiciaire de notre province. Vous y trouvez tout le vieux monde français du Canada, les écrits et la signature de presque tous les habitants qui pouvaient écrire ou signer, depuis le plus illustre représentant du Roi jusqu'à son plus humble sujet, les gouverneurs du Canada, les gouverneurs des Trois-Rivières et de Montréal, les membres du Conseil Supérieur, l'évêque de Québec, les officiers de l'armée, les intendants, les lieutenants civils et criminels, les messieurs de St. Sulpice, les greffiers, notaires et huissiers royaux, les chefs des communautés religieuses de femmes et d'hommes, les seigneurs, les négociants, enfin tous les notables du temps et grand nombre de simples colons dont les descendants forment la population canadienne-française de nos jours.

J'ai regretté que cette partie importante de nos archives nationales fut abandonnée dans nos voûtes où l'humidité a déjà détruit plusieurs manuscrits et finira par détruire le reste. Vous savez d'ailleurs ce que valent ces voûtes, lorsqu'elles sont chauffées par un grand incendie. Quand je songe qu'un grand nombre des archives et registres de Québec sont brûlés et que le même accident peut arriver aux Trois-Rivières et à Montréal, je ne puis m'expliquer que nous n'ayions encore rien fait pour en faire au moins un dévouement intelligent, ce qui pourrait être accompli en deux ou trois ans par un commissaire

familier avec l'histoire et les lois du pays, assisté d'un ou deux copistes habitués aux écritures anciennes.

Nous imprimons chaque année, à Ottawa et à Québec, à des frais considérables, tant de documents insignifiants, que je m'étonne que nous ayons fait si peu pour sauver nos annales historiques. A part la publication en 1803 des *Edits et Ordonnances*, ré-imprimées en 3 volumes avec corrections et additions en 1854-55-56, par ordre du Parlement, rien ou presque rien n'a été fait par l'Etat. Encore cette publication contient des lacunes sérieuses. Pour ne citer qu'un exemple, j'ai trouvé au volume 41 des Archives de la Juridiction de Montréal à la date du 5 mai 1727, un règlement du Conseil Supérieur de 13 feuillets et en 12 articles, concernant la manière de tenir les registres de l'état civil, qui n'a jamais été publié. Mr. J. F. Perrault, protonotaire à Québec, a publié, en 1821 et 1824, une collection d'arrêts du Conseil Supérieur et de la Prévosté de Québec. Mais ce recueil ne contient pas une seule décision des juridictions Royales de Montréal et des Trois-Rivières, et pas une décision du Conseil ou de la Prévosté de Québec avant 1727.

On peut citer plusieurs de ces arrêts que l'on ne trouve ni dans Perrault ni dans les *Edits et Ordonnances* et qui ne seraient pas sans valeur pratique de nos jours.

Ainsi le 13 décembre 1723, le Conseil Supérieur annulla un jugement de la Juridiction Royale de Montréal, qui avait condamné le nommé J.-Bte. Girard accusé de rapt d'Angélique Caron, "à être incessamment mené et conduit sur bonne et sûre garde en l'Eglise de la Paroisse de la Chine pour y estre le mariage d'entre luy et d'Angélique Caron, célébré en la manière accoutumée, si elle et ses père et mère veulent y consentir." Sur appel au Conseil, il "declare la procédure nulle et ordonne qu'elle sera recommencée aux dépens du juge de la Juridiction Royale de Montréal, par le Sr. Tonnancour, lieutenant-général de celle des Trois-Rivières que le Conseil a commis à cet effet." (Vol. 36). Cet arrêt est conforme à l'ordonnance de 1667, titre Ier, article 8.

L'on dira peut-être que les décisions de ces cours rendues sans l'assistance des avocats devaient être plus ou moins arbitraires. Il

est vrai que l'ordre des avocats n'était pas reconnu dans la Nouvelle France, et c'est sans doute ce que voulait dire notre regretté et savant confrère, Andrew Robertson, C.R., lorsqu'il disait dans la préface de son *Digest of Lower Canada Reports*, qu'avant la cession "attorneys and advocates were unknown in the province." C'est ce que le Conseil Supérieur avait déclaré en 1678 dans le procès verbal de l'ordonnance de 1667 ; il alla jusqu'à dire qu'il était "même de l'avantage de la colonie de n'en pas recevoir." Le temps a vengé le Barreau de cette injure. La décision du Conseil ne suffit pas pour interdire l'entrée du pays aux avocats ; la société en avait besoin et ils y arrivèrent presque aussi vite que les colons ; ils trouvèrent accès à toutes les cours, les juridictions de première instance comme celles d'appel, sans excepter le Conseil Supérieur ; il leur suffisait de produire une procuration spéciale de la part de leurs clients, ou, tout simplement, d'être "porteurs de pièces" ; seulement leurs vacations et honoraires n'entraient pas en taxation ; ils se faisaient indemniser de leurs clients uniquement. Dès 1686 à l'origine même du Conseil Supérieur, il chargea "M. René Hubert, praticien," de remplacer le lieutenant-général de la prévôté de Québec, allié d'une des parties (Edits et Ord. Vol. 2, page 114).

En 1701, le Conseil ordonna que la personne qui serait appelée à remplacer un de ses membres récusé ou intéressé serait choisie "d'entre les praticiens" (Ibid, page 132). En 1737, le Conseil donna un encouragement particulier à la profession des praticiens (c'était le nom qu'on donnait alors aux avocats) en ordonnant "que les écrits que feront signifier les parties dans les causes, instances et procès qu'elles auront, seront signés des parties, si elles savent signer, ou de ceux qui les auront signés en leurs noms, faute de quoi les juges n'y auront aucun égard." (Ibid, p. 189). Avant de se lier par un écrit, les plaideurs ne négligeaient pas de consulter un homme de l'art, et ils lui confiaient généralement leurs procès. Les édits et ordonnances et les dossiers des cours royales sont remplis d'arrêts rendus sur la plaidoirie contradictoire des avocats.

A Montréal, ils étaient généralement choisis parmi les quatre notaires et quatre huissiers

royaux, dont l'Edit de création de la juridiction de cette ville (1693), autorisait la commission et qui exerçaient tous comme praticiens.

Les avocats ont eu une telle influence sur les décisions des tribunaux de l'administration française en Canada, qu'ils demandaient quelque fois leur opinion sur des points particuliers de procédure ou de droit soulevés devant eux.

C'est ainsi qu'au volume 39 des Archives de la Juridiction de Montréal, à la date de 5 septembre 1725 on trouve un rapport signé "Le Pailleur" et "A. Giroüard," (mon trisaïeul) "anciens praticiens de la juridiction Royale de Montréal," commis par la dite juridiction pour s'enquérir des procédés sur une saisie immobilière de l'huissier Dudevior, dont voici les conclusions : "Certifions que le tout a été bien et dûment fait suivant les délais, commandements et observances de la ville, prévôté et vicomté de Paris, et en conséquence déclarons les dites saisies et criées bonnes et valables et faites suivant l'ordonnance."

Le juge-en-chef LaFontaine fit faire bon nombre de copies ou d'extraits des dossiers de la Juridiction de Montréal ; ils devaient servir à l'histoire du Droit Canadien que ce savant jurisconsulte se proposait de faire. La mort l'a soudainement enlevé à son pays et l'on n'a plus depuis entendu parler de ses mémoires, qui sont, croyons nous, chez M. l'Abbé Verrean.

Il appartient au gouvernement de Québec de s'occuper des archives de nos greffes. En 1872, le gouvernement fédéral a entrepris de voir aux archives qui peuvent servir à l'histoire générale du Canada ; il a organisé un bureau des archives canadiennes ; il s'est chargé de recueillir en Angleterre, en France et ailleurs ce qui peut servir à cette histoire générale.

Les rapports déjà publiés de M. Brymner, archiviste canadien et de M. Marmette, son assistant, font voir que le Ministre d'Agriculture a par devers lui une tâche gigantesque. On trouve partout en Europe, dans presque toutes les villes de la Grande Bretagne et de la France, même à St. Petersbourg, Rome et Madrid, des documents importants ayant rapport au Canada. Espérons que le Minis-

tre d'Agriculture ne se contentera pas de les faire entasser dans une chambre ou d'en donner une simple liste au public, mais qu'il en fournira le texte complet, au moins de tous ceux qui sont les plus utiles.

Pendant que le gouvernement fédéral apporte sa bonne part à la collection de nos archives, il faut espérer que le gouvernement local, pour raison d'économie ou autres, ne restera pas inactif et qu'il s'occupera sérieusement de sauver de la ruine les archives d'une nature locale ou provinciale, savoir les greffes de nos tribunaux et les actes de l'état civil, tant avant que depuis la cession. Il y a une quinzaine d'années, j'ai eu la curiosité de jeter un coup d'œil sur les jugements de la Cour d'Appel après l'Acte de Québec de 1774, à la fin du dernier siècle. J'ai été étonné d'y trouver autant de soin, de travail, et de science. Les jugements de cette époque étaient non-seulement motivés; c'étaient de véritables consultations contenant et discutant les prétentions de parties, les lois et leurs commentateurs à la main. Je me suis souvent demandé comment il se faisait que des décisions aussi remarquables n'avaient pas vu le jour. Notre plus ancien recueil d'arrêts sous la domination anglaise, celui de George Pyke, ne contient que les décisions d'un terme de la Cour du Banc du Roi tenu à Québec en 1810. Puis vient la collection en un volume de George Okill Stuart en 1834 et celle plus complète de MM. Letourneux, Leclerc et Angers, *La Revue de Législation et de Jurisprudence* publiée en 1846-47-48. On peut donc affirmer que l'on n'a absolument rien des décisions de nos tribunaux pendant les premières soixantes années du régime Britannique.

Reste cette partie de nos archives nationales encore plus importante dont je n'ai pas parlé—les registres de l'état civil. Je crois qu'il n'y a pas de pays au monde qui puisse se vanter d'avoir des annales généalogiques aussi complètes que la province de Québec. Il y a à peine trois mois, j'ai eu la curiosité d'établir la généalogie de ma famille en remontant jusqu'à la souche française. Je n'avais pas une note à part ces données plus ou moins vagues que la tradition garde dans chaque famille. J'avais néanmoins un point de départ. L'abbé Tan-

guay, ce répertoire vivant des familles canadiennes, m'avait envoyé un extrait de mariage du 1er Girouard canadien, mon trisaïeul, qui avait été célébré à Montréal le 3 février 1723. Je consultai les registres de Montréal, St. Laurent, Boucherville, St. Eustache, St. Martin, les Cèdres, Vaudreuil, Lachine, Beauharnois et St. Timothé, et à l'aide de tables alphabétiques, que j'ai trouvées presque partout, j'ai pu en quelques jours tracer la généalogie directe et collatérale de cette nombreuse famille qui compte aujourd'hui des milliers de représentants. On n'obtiendrait pas le même résultat dans la population anglaise du pays. Comme l'observe Mr. Brymner dans son rapport de 1883 —et son témoignage est confirmé par tous les protonotaires—les registres du clergé protestant sont, règle générale, mal tenus et ce qui est plus sérieux, ceux de plus d'un demi siècle après la cession sont perdus. Nos ancêtres attachaient une si grande importance aux registres de l'état civil qu'à plusieurs reprises ils ont réitéré les rigueurs des vieilles ordonnances des Rois de France et en ont imposé de nouvelles, que l'on trouve aux arrêts de règlement du Conseil Supérieur 5 août 1715, 12 juin 1741 (Edits et Ord., pp. 167 et 204,) et 5 mai 1727 non publié.

L'on peut dire sans craindre de se tromper que les registres d'aujourd'hui ne sont pas aussi soigneusement tenus. Depuis 1878 l'usage, d'ailleurs autorisé par une loi provinciale de cette année là, s'est introduit dans les grandes villes d'avoir des registres imprimés, avec quelques blancs pour les noms des parties insérés aussi brièvement que possible, sans s'occuper assez souvent de leur qualité ou même des témoins, que l'on trouve plus commode de remplacer par le bedeau ou d'autres employés de la Fabrique. Rarement ou presque jamais les deux registres sont écrits en même temps, ce qui est évidemment contre le texte du code civil.

Si le législateur n'a rien négligé pour authentifier et conserver les actes de l'état civil, le temps et les accidents, ces causes de destruction que la sagesse humains ne peut guère arrêter, en ont détruit un bon nombre. Ceux de Québec depuis l'origine jusqu'en 1840, ont été brûlés. Il en est de même des registres du Sault St. Louis, de Lotbinière et de plu-

sieurs autres paroisses. L'humidité a aussi causé beaucoup de ravages. L'abbé Cyp. Tanguay s'est chargé de les refaire, corriger, compléter et co-ordonner. Le 1er volume du *Dictionnaire Généalogique des Familles Canadiennes* depuis la fondation de la colonie jusqu'à l'année 1700 a été publié en 1871. A part les difficultés innombrables que l'auteur a rencontré dans la compilation d'un ouvrage aussi colossal, il y a aussi celles de l'impression. On dit que les frais de publication du 1er volume ne sont pas encore couverts. Chaque famille canadienne, y trouvant sa place, la plus humble comme la plus illustre, devrait souscrire à cet ouvrage éminemment national et assurer sa complétion. Le 2nd volume, dit-on, sera bientôt livré à l'imprimeur, mais il paraît qu'il faudra trois autres volumes pour traverser la période française. Espérons que l'abbé Tanguay, qui, grâce à Dieu, porte fort bien ses soixante cinq ans, trouvera la santé, les années et l'argent nécessaire pour achever son monument, le plus beau qui aie jamais été élevé par un simple particulier à la nationalité française en Amérique. Son œuvre, M. le procureur-général, se recommande spécialement à votre attention. Comme gardien des archives des familles de notre province, vous lui devez protection et secours.

Je termine cette lettre un peu longue. J'espère qu'elle portera quelque fruit. Si rien de pratique ne doit en résulter, j'aurai au moins la satisfaction d'avoir fait mon devoir.

D. GIROUARD.

NOTES OF CASES.

COUR SUPÉRIEURE.

MONTREAL, 24 mai 1878.

Coram RAINVILLE, J.

BOURGOIN et al. v. l'HON. H. G. MALHIOT et al.
Exception à la forme—Domicile—Signification—Mandamus.

Jugé: 1o. Que l'on peut sans recourir au bref de mandamus obtenir de la cour un ordre pour défendre à une personne de commettre un acte illégal.

2. Que la signification du bref d'assignation peut être faite au domicile élu du défendeur.

PER CURIAM. L'exception à la forme dans

la présente cause a été produite sous les circonstances suivantes: Bourgoin et Lamontagne prennent une action contre les commissaires de la compagnie défenderesse pour empêcher ces derniers de procéder à une expropriation. Les commissaires ont donné un avis, par lequel ils déclaraient qu'ils étaient décidés de procéder; de leur côté les demandeurs ont pris une action pure et simple, et ont conclu à ce que défense soit faite aux dits commissaires de continuer leur expropriation. Les trois commissaires ont comparu séparément, ayant produit chacun deux exceptions à la forme, ou plutôt une même exception; mais sous deux chefs différents. Par le premier chef, ils prétendent que l'action est irrégulière, parce qu'elle est de la nature d'un bref de *mandamus* ou injonction, et qu'elle n'est pas accompagnée de l'affidavit d'aucun officier en loi. Par la deuxième exception, ils prétendent qu'ils n'ont pas été assignés régulièrement, ayant été assignés à un certain bureau en la cité de Montréal, et qu'ils n'ont pas un semblable bureau ou qu'ils ne sont pas non plus en société, et qu'ils auraient dû être assignés autrement qu'ils l'ont été.

Sur le premier point, je suis d'opinion que la cause est régulièrement instituée, quelque nom qu'on donne à la requête; qu'on l'appelle bref de *mandamus* ou bref d'injonction, ou de toute autre manière, il n'en est pas moins vrai que c'est une action.

Sous l'ancien droit français, il n'y avait pas de mal sans un remède, et certainement sous l'ancien droit si quelqu'un voulait commettre un acte illégal contre un tiers, ce tiers avait toujours un remède. Je suis donc d'opinion de renvoyer la première exception.

Quant à la seconde, je suis aussi d'opinion qu'elle doit être aussi renvoyée, et que les dits commissaires ont été régulièrement assignés. L'avis qu'ils ont donné aux demandeurs, en vertu de laquelle ils voulaient procéder à l'expropriation, cet avis est daté à Montréal, et de plus, il est prouvé que les dits commissaires ont un bureau à Montréal, ou, du moins, qu'ils ont une place où ils transigent leurs affaires et d'où ils lancent leurs avis, que sur la porte de ce bureau est affichée une notice qui indique que c'est le bureau des défendeurs.

A mon avis donc, les dits commissaires ont élu domicile à cette place, et de même qu'ils signifient leurs avis de cette place d'affaires, de même on peut leur en signifier aussi à cette même place d'affaires. Par conséquent la dernière exception est aussi renvoyée.

Doutre & Cie. pour les demandeurs.

De Bellefeuille & Turgeon pour les défendeurs.

(J. J. B.)

COUR DE CIRCUIT.

MONTRÉAL, 9 septembre 1879.

Coram CARON, J.

THOUIN v. ROSAINE, et ARCHAMBAULT, *mis en cause*.

Saisie-gagerie par droit de suite—Délai.

Juge:—Que la saisie-gagerie par droit de suite peut être exercée contre le locataire après les huit jours de son départ, et même après l'expiration du bail, sauf les droits des tiers.

La défenderesse ayant laissé la maison du demandeur le premier de mai, sans payer la balance due sur son loyer, ce dernier fit saisir-gager par droit de suite les effets de la défenderesse, le 27 mai dernier, plus de trois semaines après le départ de la défenderesse. Celle-ci contesta sur le principe qu'il était trop tard; la saisie-arrêt aurait dû être faite dans les huit jours de son départ.

Le demandeur prétendit que vis-à-vis le locataire, la saisie-gagerie pouvait être prise par droit de suite en tout temps. Il cita en ce sens: *Beaudry v. Rodier*, 10 L. C. J.; *Serurier v. Lagarde et al.*, 13 L. C. J. 252.

La Cour maintint les prétentions du demandeur, et la saisie-gagerie fut déclarée bonne et valable.

Thibault & McGoun pour le demandeur.

Prévost & Préfontaine pour la défenderesse.

(J. J. B.)

THE QUEEN v. DOUTRE.

To the Editor of the LEGAL NEWS:

Sir,—The tone of "R." 's criticisms of the judgment of the Judicial Committee—"flouts, taunts and gibes" I am afraid they will be considered in England) shows at any rate the great difference of opinion in Lower Canada on this subject. "R." seems to me to have entirely missed the point of view

from which their Lordships have looked at the case. If Mr. Doutre's remuneration is to be looked at as would that of a contractor or builder, for instance, it was all important to know if the fixed amount agreed upon with Sir Albert Smith was to be in full, or whether, in a certain contingency at least, it was to be on account. In the one case there would be no occasion to value the services of Mr. Doutre, since the amount would have been expressly fixed by the contract; while there would be in the other, as falling under an implied contract, that whatever the services were worth would be paid.

As to whether the law of Lower Canada is what the Judicial Committee states it to be beyond dispute, if I may venture to say so, I think it was; and I can easily understand that the Counsel of the Crown should have made the admission, if they really made it. But it was clearly a misunderstanding if it was assumed that there was no dispute on the subject in Lower Canada, for according to the jurisprudence of our Court of Appeals, Mr. Doutre would have certainly failed.

What is to be regretted is that the arguments *pro* and *con*, as they have been presented in Lower Canada, should not have been fully considered, or at least expressly passed upon by their Lordships in their written judgment.

Of course the Crown might consider they had no case if the law of Lower Canada applied, and still have been justified in their appeal to England, in the hope that they might succeed under the law of Ontario or of Nova Scotia. It is in connection with the law of these Provinces that their Lordships have alluded to the law of England. In England, solicitors can sue, but on the other hand, they are responsible for their negligence; whereas Counsel cannot sue, but neither can they be sued, either for the advice they give or for what they do or omit to do in the conduct of a case in Court, their irresponsibility in this respect going far beyond the privileges of the advocates in France, as Demolombe at least understands them. It is this complete independence of the Bar in England which some consider a part of the institutions of the country, and a matter of public policy. But, as their Lordships re-

mark, even admitting this theory of public policy to be unquestionable, which they think it is not, it could hardly apply in Ontario and Nova Scotia where barristers are at the same time solicitors, and liable to be sued. If colonial counsel have not the immunities of English barristers, why should the disabilities be imposed on them?

As to the broad question whether there is anything in the nature of the services of barristers which precludes the idea of an action, "R." on consideration, must admit that he has written too hastily. Barristers had an action in Rome, at any rate, for the fees promised, and the right of action in France is beyond question. It is the purest confusion to speak of the remedy being practically refused, because a barrister suing for his fees may be liable to suspension as guilty of unprofessional conduct. The Councils of the Bar in France are not unanimous as to this supposed breach of *étiquette*. Mr. Doutre, at any rate, runs no great risk of this kind. The liability to suspension certainly does not touch the question whether professional services give a legal title to remuneration, or whether the amount admits of determination where the parties have not determined it themselves.

The high authority of Judge Day and his very able and striking observations in *Devlin & Tumblety* have unduly influenced the profession in Lower Canada, in my opinion. While he recognized fully the right of the Bar to make contract and to sue, he considered that in the absence of an express contract it was implied that the Tariff should govern. Where, however, the Tariff did not apply, he distinguished between services which were akin to those of a solicitor and which could be valued at least approximatively, and the purely intellectual services of a barrister which could not.

But, after all, intellectual services admit of being valued and are valued every day in practice, those of English barristers and physicians included. It is only a question as to how they can be most properly valued.

In France, the Tariff does not govern between counsel and client, it only determines what the losing party can be forced to pay. Between *avocat* and client the *avocat* takes

his own bill, subject to the sole revision of the Council of the Bar. In England, the powers of taxing officers are very large, and meet the requirements probably of all but very special cases. The amounts charged by barristers in particular, are those which will be allowed to the solicitor who pays them or agrees to pay them, when the bill comes to taxed. Of all modes of valuation, it seems to me, however, that the worst is that which necessitates a regular *enquête* in the ordinary way. In France, all questions of the value of services and work done were left to the determination of regular permanent officials, or, in special cases, of *experts*. The parties should be encouraged to make special contracts in extraordinary cases, and for the usual run of services they should be subject to taxation in the usual way.

One feature of Mr. Doutre's case which is likely to give rise to considerable discussion in the future is this: the contract, as understood by Mr. Doutre, seems to have been that if the award were a good one he was to be liberally treated; but he would consider the fixed sum paid him as final, if the result were unfavourable to the Government. Judge Strong, not without some very good reasons, thought that this meant that Mr. Doutre would, in the contingency supposed, trust to the generosity of the Government. But this view has been over-ruled in England, for it can hardly be supposed that it escaped notice. This would seem to indicate that their Lordships do not view with any particular horror agreements for contingent fees. In fact it looks as if a contract, based to some extent at least on the amount to be recovered, might not be considered invalid under certain circumstances.

E. B.

Montreal, 30th August, 1884.

GENERAL NOTES.

In an article on the late Mr. Justice Williams the *Law Journal* (London) says: "In his mode of trying prisoners he was exceedingly fair to the accused, and once, when asked whether those whom he tried appeared to have any general characteristics, he replied: 'They are just like other people; In fact, I often think that, but for different opportunities and other accidents, the prisoner and I might very well be in one another's places.'"

The Legal News.

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CHIEF JUSTICE MEREDITH.

It is with much regret the bar have learned that the state of Chief Justice Meredith's health renders a period of repose imperative. When it was first announced that the learned Chief Justice was desirous of retiring from the bench, it was stated that the Government had requested him to withhold his resignation, and to accept a few months' leave of absence, it being hoped that a season of rest would render retirement unnecessary. It is understood, however, that the Chief Justice has pressed his resignation on the Government, advancing years having constrained him to seek the repose to which his long and eminent services so justly entitle him.

A PHASE OF EQUITY.

The *Law Journal* (London) says:—"By the retirement of Mr. Glasse, Q.C., from the bar, there passes into history the most prominent figure of what may be called the domestic era of the administration of equity, when each judge not only had his own bar into which outsiders seldom intruded, but each bar had a Queen's counsel notoriously possessing the ear of the judge. The relation between Vice-Chancellor Malins and Mr. Glasse was less that of judge and advocate than of judge and trusted friend and adviser. Mr. Glasse would mention a date on which some event in the cause happened—say August 15. 'I don't know where you were, Mr. Glasse, on that day,' the Vice-Chancellor would say, 'but I was at that pretty little place Odde, at the end of the fjord in Norway, and enjoying myself very much.' Then Mr. Glasse would recollect where he was, and notes would be compared, until at last the conversation glided back to the affairs of the litigants. Under that system a counsel was valued not more for power of advocacy and knowledge of law—although Mr. Glasse and other leaders as happily situated had both—than as a friend at Court, especially in the numerous matters which lie entirely within the discretion of the Chancery judge. Nowadays common law counsel invade the Chan-

cery Courts, and the leaders of the bars of the various Chancery judges more frequently encroach upon one another's domains, so that the judge does not see day after day the same counsel before him, and the proceedings, though more stiff and formal, are more business-like and more suitable to the cold atmosphere of a court of law."

ADMINISTRATION OF THE LAW IN ENGLAND.

Our readers are aware that considerable dissatisfaction exists in England in consequence of the block of business before the Courts. One of the remedies which has been suggested is the limitation of the right of appeal—a suggestion which seems to be based on the notion that instead of the Courts being made for suitors, the latter should be reduced so as to suit the convenience of the Courts. In a letter signed "W.B.," which appeared in the *Times* of Aug. 21, the subject of the administration of the law is discussed in a very able manner, and the defects of decentralization, most of which have been experienced in a marked manner in this Province, are clearly pointed out. The writer says:—

"The first question seems to me to be whether the law, civil and criminal, or either of those divisions of it, should be administered by a central judicial body or by separate independent judicial bodies. Authority, great authority, is in favour of the former. For several hundred years, when journeying was difficult and absence from London therefore long, our forefathers persevered in collecting in London as the judicial body the most skilled members of the law, and in sending a certain number of that body at settled intervals to administer the law in every county in England. It seems at first sight strange, though it may nevertheless be right, that the time selected to advocate an entire reversal of this system is the time when travelling has become easy and rapid, and when, therefore, the period of absence from London is immensely shortened. The following reasons seem to me to be in favour of the old system. To alter it you must have a local tribunal in each county, or a local tribunal for certain united counties, or a partial system giving local tribunals to some places and administering the law in the rest of England, as now, by Judges from London. As to the first, you must overwhelm the County Court and introduce into it business of a far higher kind than the existing County Court Judges

have yet undertaken, or you must have a local Judge besides the County Court Judge. In either case, you could not get the highest lawyers to accept the office at any price. You might get an efficient lawyer at a certain price. But his original efficiency would deteriorate for two reasons—first, because he would be always alone; secondly, because he would have before him an inefficient Bar, which is the ruin of Judges. This would be so because there would not be sufficient business to attract a powerful Bar. Both Judge and Bar would for the same reason be constantly idle. The administration of the law would be too much criticized. A local Judge must live altogether apart, or only with his officials, or with a part only of the local inhabitants. And his course of life in these respects would be known. His opinions, too, would be known. The result would be that, although impartial in fact, his decisions would be canvassed. Another objection is that the combined salaries of so many Judges would be enormous.

"As to the second plan, that of a provincial Court, it would be established at a central place. Those who had to come to it from other places would experience all the inconveniences urged against the present system. Parties and their solicitors would have to wait away from home; the solicitors would be obliged to employ agents at the central place. The objections as to the class of Judges, as to the Bar, as to the expense, as to the waste of time, though not in so great a degree as to the first method, would seriously apply to the second. The suggestion contained in the third method is, obviously, that there should be a local judicial tribunal with a local Bar at Liverpool, Manchester, and Leeds. With regard to Liverpool and Manchester there must be one staff of Judges for both or one for each. If a different staff for each, I allege, and I have known the business of Liverpool and Manchester for many a long year, that all the objections I have stated above would apply with all their force. Neither place has legal business enough to occupy the whole time of a Court. The Bar would be stronger than in the first or second system, but it would not be the best. The Judges would not be the best that the profession can produce. The first class of barristers would not accept a provincial office and a provincial life, even in such cities as Liverpool and Manchester. The society, though large, is not large enough to absorb a Judge as he is absorbed, and thereby happily unknown, in London. Liverpool and Manchester have now the best of the profession for their Judges and their Bar. They think they would like a change. If they had it they would weep and lament. If there were to be one tribunal for Liverpool and Manchester the same objections would

apply, save only that the amount of business would be greater. As to Leeds, all the objections are in full force. And if these local tribunals were established the appeal must still be heard in London, or the London Court of Appeal must hold sittings in Liverpool and Manchester and Leeds, or there must be separate independent local Courts of Appeal. In the first case, the present complaints would continue; in the second, the circuit system would still exist in a secondary stage; in the third there would be an inferior Court of first instance and an inferior Court of Appeal. And separate independent Courts of appeal mean divergent law. In considering this question of separate local Courts one should consider their effect on London. Unless they are to be an absolutely clear addition to the number of Judges the staff in London must be reduced, and then the business of London would be administered more slowly. I conclude that the central system is best for all. By no means, however, let it be supposed that the application of it cannot be improved.

"The next question is what is the best practicable method of administering the central and consequent circuit system. The problem is what is the best method by which the same staff of Judges can administer the law both in London and on the circuits. The number of Judges in the Queen's Bench Division is 15. It was lately found to be necessary that the circuit business should be undertaken solely by those Judges. It was, at the same time, for the sake of the London business, thought desirable that not more than ten of those Judges, if possible, should be absent from London at the same time. The best way of solving that problem was beyond doubt to group some of the smaller counties for the purposes of criminal and civil business, as recommended by a committee of the Judges. But to do so required an Act of Parliament, and it was said that it would not pass. The next best plan was to group certain counties for civil business; but it was stated that objections in Parliament would be irresistible. It remained to try the experiment, which is now being tried, of sending one Judge only to certain places. Until Parliament will allow a better method we must be content to try and work by an inferior one. The present plan was not tried in its full development during the last circuit. Yet I undertake to say, although there was inevitable friction in the first working of a totally new system, that it did not fail. Weak points were discovered; they will be amended. The form for fixing the commission days set forth in the Order in Council must be treated with more elasticity; the power of sending for assistance in case of emergency must be freely used. On the last circuit, however, no cause was left as a re-

manet by order of a Judge; in the Court of Appeal 75 appeals were heard, which would not have been heard if three Judges of the Court had gone the circuit; that represents 150 appeals in the year. No Judge of the Chancery Division was away; the Admiralty Court sat without intermission. In this last circuit an insufficient time was given to some places; London was too much denuded of Judges; but in the future more time can be given to those places, and the number of Judges of the Queen's Bench Division left in London will never be less than four, and that at the outside for 18 days. During the greater part of the circuit, there will be seven or eight Judges in London. The prospect is good.

"The next question is whether the right of appeal should be free or limited. It is often said, '*interest respublice ut sit finis litis*.' This proverb is, of course, not cited to prove that an unfounded appeal should not be allowed but that on the whole it is better that a well-founded one should not be permitted. It is cited in order to prevent an appeal in a case in which by hypothesis the decision is wrong. So used can it be justified? The primary duty of the State is to administer the law, that is, decision, first between the State and individuals, which is the criminal law, and, secondly, between disputing individuals, which is the civil law. The State undertakes the latter duty for the same reason as it does the former—namely, in order to preserve the peace and to prevent oppression. How does it interest the general body that there should be no further litigation between two individuals? What difference does it make to the State? But, on the contrary, by what rule of right can the State say to an individual to whom it has promised justice, that he must rest contented to pay debt or damages and costs by virtue of a judgment admitted to be unjust? *Fiat justitia* is the only rule which interests the State, because it is the highest duty of the State to see that justice is done. If an appeal or a number of appeals is or are shown by experience to insure justice they ought to be allowed. It is only a useless reiteration of appeals which ought to be prevented. The propriety or impropriety of the present course of appeals is, therefore to be tested by the inquiry whether it is more than is necessary to secure satisfactory justice. Few people know the extent to which appeals are now limited. On points of procedure, it is often said, there may be appeal from a Master to a Judge, to a Divisional Court, to the Court of Appeal, to the House of Lords. This is true in theory. But in the last year 5,000 orders were made by the Masters of the Queen's Bench Division, of which 500 were carried to Divisional Courts, 50 on to the Court of Appeal, one to

the House of Lords, who in it reversed the decisions of all the former Courts. Observe this—1 per cent. of the Masters' orders were subject to a double appeal. And many of these cases of procedure were dependent on the construction of new rules. As to other appeals, there are in all cases in the Chancery Division but two appeals, one to the Court of Appeal, one to the House of Lords. In the Queen's Bench Division, all cases tried by a Judge without a jury, all special cases, all applications made first to a Divisional Court, are subject to two appeals only, to the Court of Appeal and to the House of Lords. It is only in cases tried by a jury that there is a third appeal. In other words, in more than three quarters of the vast number of cases decided in a year in the different Courts there can be only two appeals. In a great majority of those cases there is no appeal at all. A large number do not go beyond the first appeal. And now apply the test: I have been a close observer of and intimately acquainted with the business of the Court of Appeal from the time that Court was instituted until now. I undertake to affirm, with the most undoubting conviction, that there are now hardly any appeals brought before either branch of the Court of Appeal which do not contain fair and reasonable matters for appeal. Day after day, hour after hour, the points raised are difficult and important. In hardly any case could the Court refuse leave to appeal if it were necessary to ask leave. To impose that obligation would add a hearing to most appeals. I undertake to say that reasonable satisfaction to suitors would not be fairly given without a free right of appeal to the Court of Appeal. Let those who challenge the further appeal to the House of Lords learn how few appeals there are from the Court of Appeal. And those few are not unreasonable. I am sure that I can answer for the Judges of the Court of Appeal that they consider that the further appeal to the House of Lords has conduced to justice. I conclude that to limit the right of appeal which now exists would work just dissatisfaction and cause injustice. Frivolous appeals have been stamped out. But in case they should arise again I would advocate a statute giving power to any Court to declare, if it saw reason for so doing, that any litigation instituted by a solicitor, or any step in litigation carried out by him, was frivolous and vexatious and ought not to have been undertaken by a reasonable, careful, or honest solicitor, even with the consent and at the request of his client, and upon such declaration to order that no costs should be allowed even between the solicitor and his client. And if after such order a solicitor were to accept payment it should be deemed to be misconduct as a solicitor, to be dealt with accordingly."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, March 29, 1883.

Before DORION, C.J., MONK, RAMBAY, CROSS,
BABY, JJ.

MOLSON, Appellant, & CARTER, Respondent.
Provisional execution of judgment—Aliments.

Where a judgment of the Court of Queen's Bench in appeal has been rendered, declaring that certain rents, which had been attached, were really "aliments" and "insaisissables," the party in whose favor such judgment has been rendered cannot obtain an order to execute the judgment provisionally, if permission to appeal from the judgment to the Privy Council has been granted.

Molson succeeded, by a judgment in appeal, reported in 6 L. N., p. 372, in having the rents and revenues of certain property declared to be "*insaisissables* and bequeathed *à titre d'aliments*." Permission to appeal from this judgment to the Privy Council was granted to Carter.

Molson now moved for an order that the judgment (from which leave to appeal had been granted) be executed provisionally. It was urged in support of the application that the rents had been declared *aliments*, and that the petitioner Molson was in great want, and required these rents for the support of his family.

DORION, C.J. Judgment was rendered a few days ago, setting aside the seizure of the rents of certain real estate of the appellant Molson, on the ground that said rents were not liable to seizure under the will of the late Hon. John Molson, appellant's father. The appellant has since presented a petition, by which he asks that the judgment be executed provisionally, pending the appeal to the Privy Council. The authorities cited by the petitioner have no bearing upon the case. There is no doubt that in France judgments of this nature are often given; but the question is not what is done in France, but whether we are justified in granting such an order in the present case. Our own Code speaks of *pension alimentaire* in two instances, but there is no provision similar to that contained in the Ordinance of 1667. It is to be remarked also

that the 1178th and 1179th articles of our Code, which authorize appeals to the Privy Council, say that execution of the judgment shall be suspended for six months where security has been given. In the absence of any provision similar to that contained in the Ordinance, the articles of the Code would seem to be conclusive that there is no right to provisional execution. In the case of *Morrison & Dambourges*, in 1868, the respondents produced affidavits showing that they were in the greatest need, and asked for a temporary provision. Nevertheless, the application, which was for only a small part of the sum in dispute, was rejected.

The Court is of opinion that there is no precedent under our system for granting such an application. Molson, in fact, is asking for the thing in dispute, and which would be consumed if we granted his petition, so that a reversal of the judgment would be of no benefit to Carter.

Petition rejected.

Barnard & Co. for the appellant.
Abbott, Taft & Abbotts for respondent.
S. Bethune, Q.C., counsel.

SUPERIOR COURT.

MONTREAL, September 2, 1884.

Before JOHNSON, J.

WHITE v. WHITEHEAD et al., and THE PLAINTIFF, petitioner.

Injunction—Interlocutory order.

If the defendant disputes the plaintiff's legal title or denies its violation, the Court will seldom, upon an interlocutory order, grant an injunction before the plaintiff has established his title. The burden lies upon the plaintiff of showing that his inconvenience exceeds that of the defendant.

JOHNSON, J. The plaintiff, by his petition, now asks for an interim injunction.

The action alleges an infringement by the defendants of the plaintiff's rights which he holds by assignment from Joseph Kieffer, the patentee. Kieffer, the patentee, first sold to Larose, and afterwards he, together with Larose, sold to Whitehead and Boivin by the name of the Coté Counter Company,

These rights consisted in the exclusive privilege to use, sell and dispose of, in whole or in part, certain machines and improvements in machines for making boot and shoe counters; and in case of insolvency of the Coté Counter Company, Kieffer and Larose were to have the right to cancel the agreement unless they got security for the royalty. The action then alleged the insolvency of the company, and of its individual members, and proceeded to aver that on the 21st May, 1884, the company (which had undergone some change of members) cancelled their agreement with Kieffer, and reassigned their rights to him; and then, on the 2nd June, 1884, there was a further transfer to Kieffer of the assets of the counter company, Darling, Whitehead's assignee, under the assignment made by the firm of Stimson, Cassils & Co., intervening. Then, on the 17th of June, 1884, Kieffer assigned all his rights to White, the plaintiff, who now alleges that Whitehead and Joseph R. Hutchins, under the name of E. A. Whitehead & Co., and two other persons of the name of Kieffer (Louis and Felix) are working and using these two machines contrary to his exclusive rights under the assignment to him by Joseph Kieffer; and he asks that they may be stopped, and made to render an account, and to pay damages. This is succinctly the plaintiff's case, as stated, by himself. Before the defendants could plead to the action, and the day after the writ was returned, the present petition for an *interim* order was made, and the defendants Whitehead and Hutchins, who are said to be working and using these machines for their benefit (the two Kieffers being merely employed to run them as workmen under the former's orders) appeared, and they say in answer to the petition that Whitehead is in possession, and owner and proprietor of these machines, having a good and sufficient title, and being in possession long previous to, and at the time of the petitioner's alleged purchase, on the 17th of June. He further says that these machines were made for the counter company while they were the undisputed holders and assigns of the patent, and before the re-assignment to Joseph Kieffer by the counter company, which in no manner affected the property, and that he acquired

and got possession with the express consent of Joseph Kieffer, and has had it ever since. There is no doubt that Whitehead is using two machines of the kind patented by Jos. Kieffer; but the difficulty is as to the violation of Kieffer's right; that is the main point in dispute, and it really goes to the very foundation of the case. The pretensions of the plaintiff and petitioner, on the one hand, and the defendant on the other, cannot both of them be true. Each alleges a plain and distinct right in himself, and they are irreconcilably at issue on the point.

If what the defendant says be true, he might be ruined, and certainly would be deprived of all the benefit of his defence to the action, if I were to grant the petition; while on the other hand the plaintiff suffers nothing but temporary inconvenience if I neither grant nor refuse it, but merely suspend it till the hearing. The possession of Whitehead, with Jos. Kieffer's consent, after the re-assignment to the latter (of which fact there can be no doubt), is of great possible significance, and if unexplained, would raise a very strong presumption of the truth of the defendant's main pretension. The defendant, it is said, revendicated these two machines soon after the assignment to White, and his action is still pending; and he got possession under an order of the court on giving security in the ordinary course under a writ of revendication. I do not regard that kind of possession taken merely by itself, as of much importance to show his right: but his possession up to the 17th June, the time of the assignment to White, is, or may be, a very different matter, for the plaintiff can have no greater right than his assignor; and this consent of his assignor to the continued possession of Whitehead is not satisfactorily explained.

I have confined myself strictly to the pretensions of fact of the parties as disclosed by the pleadings and the affidavits, because, although there are other questions of grave ultimate importance, they ought not to be decided now, and could not be so without prejudging the merits of the action, which are not before me.

The principles that relate to the granting or the refusal of an interim order of this na-

ture are found in a series of cases cited by Kerr in his treatise on injunctions. They apply to almost every conceivable state of circumstances under which it can be asked, and the present circumstances seem to be completely met by the cases cited in note (u) p. 209. The result of those authorities is that if the defendant disputes the plaintiff's legal title, or denies the fact of its violation (and here he does both), the court will seldom, however clear the case may in its opinion be, grant an injunction without putting the plaintiff to establish his legal right. It is said indeed here that the plaintiff's legal right depends upon an authentic deed. The defendant, however, denies it and says it does not apply in the manner and to the extent that it is asked for. Besides, the authenticity of the deed of reassignment and surrender to Jos. Kieffer does not necessarily affect the facts of the case, but only the mode of proof.

Upon the principles laid down in *Bacon v. Jones*, and the other six cases cited by Kerr, and which I have already mentioned, this petition will, therefore, stand over until the final hearing. I have alluded to the doctrine of comparative convenience, and the authorities upon that head seem no less clear than on the point of legal title and the denial of its violation where both are denied. "The burden," says Kerr, "lies upon the plaintiff, as the person applying for the injunction, of showing that his inconvenience exceeds that of the defendant. He must make out a comparative inconvenience entitling him to the interference of the court." And again: "The court, upon the application for an interlocutory injunction in support of a legal right, will deal with the injunction upon the evidence before it, and, as far as possible, abstain from prejudging the question in the cause."

In the present case, it appears to me that it would be impossible to say that either the one party or the other should get what he asks without substantially deciding the whole case.

Adjudication on petition suspended until hearing on the merits.

Laflamme & Co. for plaintiff.

L. N. Benjamin for defendants.

COUR SUPÉRIEURE.

MONTRÉAL, 17 janvier 1878.

Coram JOHNSON, J.

LABELLE v. LIMOGNE.

Défense en droit — Libelle — Chaussée — Réfutation à des experts.

Le défendeur en cette cause est propriétaire d'un moulin à farine à Ste. Rose, et a construit une chaussée sur la rivière de cette localité pour se procurer un pouvoir d'eau qui fait mouvoir ce moulin. Le demandeur, de son côté, est propriétaire de deux terres situées sur le bord de la rivière, l'une à environ deux milles, et l'autre à trois milles de la chaussée en question.

L'action est en dommages causés par la submersion de ses terres et pour faire démolir cette chaussée.

Le défendeur a d'abord plaidé une défense en droit qui a été renvoyée parce qu'elle ne mentionnait pas, avec assez de précision, en quoi la déclaration du demandeur n'était pas pertinente; puis il a plaidé en fait niant que la chaussée soit une cause d'obstruction ou de dommages; il ajoute que si le niveau des eaux de la rivière Ste. Rose a été élevé, cela est dû à des causes purement naturelles et indépendantes de l'existence de cette chaussée.

Le jugement est comme suit:

« La Cour, etc.

« Considérant que la cause d'action en cette affaire dépende des faits qui demandent à être constatés avec précision et d'après des mesurages exacts faits par une personne de l'art, la Cour est d'opinion et décide que la preuve entendue ne lui fait point connaître suffisamment les faits essentiels à cette cause, et en conséquence elle ordonne, avant de rendre jugement sur le mérite, qu'un ingénieur civil (expert) à être nommé, suivant les Règles de Pratique, par les parties, la Cour ou par un juge en chambre, constate les faits suivants et en fasse rapport:

1o. La distance du centre de la chaussée bâtie par le défendeur, à la propriété en premier lieu décrite par la déclaration du demandeur;

2a. La distance du centre de la chaussée du défendeur, à la propriété en second lieu décrite, du demandeur;

3a. La profondeur de l'eau au milieu de la rivière, vis-à-vis la propriété en premier lieu mentionnée;

4a. La profondeur des eaux au milieu de la rivière, vis-à-vis la propriété en second lieu mentionnée;

5a. La profondeur des eaux au milieu de la chaussée;

6a. La hauteur de la chaussée à partir du lit de la rivière;

7a. La différence du niveau de l'eau entre un point du milieu de la rivière, vis-à-vis la propriété en premier lieu décrite et un point du milieu de la chaussée;

8a. La différence du niveau de l'eau entre un point du milieu de la rivière, vis-à-vis la propriété en second lieu mentionnée, et un point du milieu de la chaussée.

Et la Cour ordonne que le dit expert à être ainsi nommé, fasse rapport sur le tout le ou avant le premier de juin prochain.

Ouimet, Ouimet et Nantel pour le demandeur.
Loranger, Loranger et Pelletier pour le défendeur.

(J.J.B.)

PHILOSOPHY FROM THE BENCH.

MR. JUSTICE STEPHEN'S strict views of the legal limits of discussion on the subject of religion do not prevent his handling such topics in the press with a freedom which would have startled most of his predecessors on the bench. The learned judge will not, however, require as a disputant the saving grace of the Chief Justice's milder definition of the law, which as a lawyer he repudiates, because the main argument to which the 'Unknowable and Unknown' is directed is orthodox so far as it goes. Mr. Justice Stephen, in the *Nineteenth Century*, condemns the attempt of Mr. Frederic Harrison, another lawyer, and Mr. Herbert Spencer to divorce religion from theology, and will not accept a religion of Humanity or of the Unknowable, whether spelt with or without capital letters. The learned judge thus sums up his views on this head:—

I contend that to expect to preserve the morals of Christianity while we deny the truth

of Christian theology is like expecting to cut down the tree and keep the fruit; that if the Apostles' Creed be given up, the Sermon on the Mount and the parables will go too; that parodies of them are inexpressibly dreary; that to try and keep them alive by new ceremonies and forms of worship made on purpose is like preparing ingredients and charms which would make Medea's caldron efficacious.

The learned judge is, however, very far from being in despair, for he adds:—

But I also contend, on the other hand, that if Christianity does pass away, life will remain in most particulars and to most people much what it is at present.

This idea is further developed in an earlier passage in the paper:—

Love, friendship, ambition, science, literature, art, politics, commerce, professions, trades, and a thousand other matters will go on equally well, as far as I can see, whether there is or is not a God or a future state; and a man who cannot but occupy every waking moment of a long life with some or other of these things must be either very unfortunate in regard of his health or circumstances, or else must be a very poor creature.

Although he thinks the world can get on without theology, the writer fully appreciates its beauties:—

No doubt the great leading doctrines of theology are noble and glorious. To be able to conceive of the world as the work of a Being infinitely wise, infinitely powerful, and, in some mysterious way, infinitely good; to regard morality as a law given to men by such a Being; to look upon this outward and visible life as only a part of some vast whole, other parts of which may vindicate its apparent inconsistency with the wisdom and goodness which are ascribed to its Author, is a great thing. People really able in good faith to look on the world in that light are ennobled by their creed; they are carried above and beyond the vulgar and petty side of life; and, if the truth of propositions depended not upon the evidence by which they can be supported, but on their intrinsic beauty and utility, they might vindicate their creed against all others.

Lawyers who read this disquisition will be apt to attribute the solidity of these views, which contrast favourably with the vagueness of most philosophical speculations, to the practical training of a lawyer. Their cheerfulness is almost an inseparable incident of the successful man of action.—*Law Journal* (London).

READ v. ANDERSON.

The decision of Mr. Justice Hawkins in *Read v. Anderson*, 52 Law J. Rep. Q. B. 214, which was unfavourably criticised in these columns on April 7, last year, has been affirmed in the Court of Appeal, the Master of the Rolls dissenting. The question was whether a commission agent, having lost a bet made according to agreement with his principal in the agent's own name, and having paid it contrary to the directions of his principal, can recover it from the principal. The Master of the Rolls is unable to accept Mr. Justice Hawkins' ingenious 'finding of fact,' that the authority to pay was not revoked—a finding based on the notion that, although the plaintiff declined to allow the payment of this bet, he did allow the payment of other bets. The Master of the Rolls is further unable to imply any contract to indemnify the plaintiff against the discredit which would fall on him on the turf by reason of his not paying his bets. The majority of the Court, consisting of Lords Justices Bowen and Fry, are of opinion that such indemnity is implied. Betting on commission is one of the most important industries of the racecourse at the present day, and this decision will be considered highly satisfactory by commission agents, because practically it makes their debts recoverable at law. In 1845, when 8 & 9 Vict. c. 109 was passed, this form of speculation on the turf was probably almost unknown. If the principle of that statute is to be maintained, it ought to be amended, and it is not impossible that the question may arise whether the recovery of debts paid by authority ought to be allowed in a Court of law. It is, however, to be hoped that the present case will be taken to the House of Lords, when it will be open to that tribunal, besides passing judgment on this new implied indemnity, to say whether a greater effect ought not to be given to the words 'null and void' in the statute than has hitherto been attributed to them in the Courts below.—*Law Journal*.

GENERAL NOTES.

The London (Eng.) Chamber of Commerce has passed a resolution favouring the passage of a bankruptcy act in Canada.

It is stated that Lord Petre, who, at the autumn session of Parliament will take the seat vacated by his

father, who recently died, will be the first Catholic priest who has sat in the House of Lords since the reformation.

The *Law Journal* (London) says: "There is little probability of the details of what would form a romantic biography being supplied from Mr. Benjamin's papers, as Mr. Benjamin made it a habit to destroy all private documents immediately they ceased to be of practical value. Half the misery of life, he used to say, was caused by treasuring old papers."

The rapidity with which the old order of sergeants is dying out of memory is evidenced by the fact that a correspondent last week wrote to ask whether sergeants or Queen's Counsel had precedence. We must refer him to Mr. Serjeant Pulling's book if he wishes to know how it all came about; but the answer is, that Queen's Counsel rank first in England, but the sergeants in Ireland. Before Queen's Counsel became a recognised institution the leader of the bar ranking before the Attorney and Solicitor-General was the Queen's ancient serjeant, over whom Mr. Serjeant Pulling so eloquently cries 'Ichabod.'—*Law Journal*, (London.)

On one of the many official excursions made by boat to Fortress Monroe and Chesapeake bay, Chief Justice Waite of the Supreme Court, Judge Hall of North Carolina, and other dignitaries of the bench were participants. When the government steamer had got fairly out of the Potomac and into the Atlantic, the sea was very rough, and the vessel pitched fearfully. Judge Hall was attacked violently with sea-sickness. As he was retching over the side of the vessel and moaning aloud in his agony, the chief justice stepped gently to his side and laying a soothing hand on his shoulder said: 'My dear Hall! can I do anything for you? just suggest what you wish.' 'I wish,' said the sea-sick judge, 'your honor would overrule this motion!'

In Paris, in May last, the dismembered portions of a human body were found in the Seine near the Pont Neuf; but, though an inquest on these remains proved that murder had been committed, no success followed the endeavours to find the murderer. It chanced, however, some time afterwards, that a dog was remarked whining about the river banks near the Pont Neuf, and it was ascertained that the animal belonged to a shopkeeper who had been missing from his home since the end of April. The clew was followed up. It shortly transpired that on a certain day the tradesman, with his favourite dog, had gone to the lodgings of a café waiter, named Mielle. The latter's neighbours deposed to hearing screams and cries for help issuing from the rooms, and it was found that the waiter had disappeared, after causing a couple of boxes containing something heavy to be removed from his lodgings to a hotel near the river. It is conjectured that the dog witnessed the ghastly dismemberment of his master's body, and followed the murderer when he went to throw it into the Seine. Enough was learned, in fact, to induce the police to issue a warrant for the arrest of the waiter, which was effected last week at Bar-sur-Aube, Mielle confessing the crime.

The Legal News.

VOL. VII. SEPTEMBER 20, 1884. No. 38.

COUNSEL FEES.

In connection with the discussion over the case of Mr. Dautre, which has occupied some space in our columns, we may refer to the latest judicial exposition on the subject of counsel fees. In the case of *In re Cockayne*, judgment was rendered by the English Court of Appeal, Aug. 7. It was an appeal by Mr. Yeatman, a barrister, from a refusal by Mr. Justice Stephen and Justice Mathew to strike Mr. Cockayne, a solicitor, off the rolls. It appeared that Mr. Yeatman had been employed by Mr. Cockayne in a number of different matters, and that fees to the amount of 100 guineas were due in respect of them. Mr. Yeatman alleged that in several cases Mr. Cockayne had received the fees from his clients and had failed to pay them over. This was denied by Mr. Cockayne, who, moreover, asserted that there was an agreement between him and Mr. Yeatman to the effect that the latter was to have any business that Cockayne could give him, but was only to be paid the fees when Mr. Cockayne himself obtained them. This agreement Mr. Yeatman denied.

The Master of the Rolls said that the appeal must be dismissed. The case was full of lamentable disclosures. He had always stood up for the observance of the most scrupulous honour in the profession. One of the first rules had always been that a counsel's fee was not a debt. Every barrister knew that rule, and ought not by any legal proceeding to press for his fee. The old rule was that no barrister should take a brief unless the fee was paid at the time. If, however, he did so, he had nothing but the solicitor's honour to look to. He had no right to apply to the client in any way. The duty of a solicitor was reciprocal; he should mark a proper fee, and should under any circumstances pay it. He knew that he was under an honourable engagement, and if he made excuses for not paying counsel's fees he acted unprofessionally. It followed that

any agreement as to fees was wholly unprofessional and was equally dishonourable to both parties. It was not, however, necessary to decide whether or not there had been such an agreement in the present case. The question was whether Mr. Yeatman had made out a sufficient case. The Court would never interfere in respect of the mere non-payment of fees, though in cases of fraud they would do so—as, for instance, where a solicitor obtained fees from his client upon the allegation that they were due to counsel. That was to punish the fraud, not to assist the barrister to recover his fees. Mr. Yeatman had shown no case which would justify the Court in striking Mr. Cockayne off the rolls. There was no proof that he had received fees which he had corruptly refused to pay over. There was no proof of a corrupt intention, although for a time Mr. Cockayne claimed to retain certain fees in order to set them off against a claim of his own against Mr. Yeatman. There was no power to do that, but that only showed that Mr. Cockayne had taken a mistaken view. That was not dishonourable. The whole attempt to obtain these fees was a breach of the regulations between a barrister, the public, and the profession.

Lords Justices Bowen and Fry gave judgment to the same effect.

BUSINESS IN APPEAL.

At the opening of the September Term of the Court of Appeal in Montreal the number of cases inscribed was 84. In 1882 there were 107 inscriptions at the beginning of the September Term, and in September 1883 the number was 106. The two extra terms of December and February last, therefore, show as their result a gain of 22 cases.

APPOINTMENT.

The Hon. John O'Connor, who has been appointed to the vacant judgeship of the Queen's Bench Division, Ontario, was born in Boston in 1824. He was called to the bar of Upper Canada in 1854, and made a Queen's Counsel in 1873. He has filled the following positions in the Dominion government:—President of the Council from July, 1872, to March, 1873; Minister of Inland Revenue,

from March, 1873, to July, 1873; Postmaster-General, from July, 1873, to November, 1873, when the government resigned. In the present government he was President of the Council from October, 1878, to January, 1880, when he became Postmaster-General; Secretary of State from November, 1880, to May, 1881, when he again became Postmaster-General, which appointment he resigned in May, 1882, when he retired from the cabinet. Recently Mr. O'Connor has been acting as a commissioner for the consolidation of the Statutes.

DOUTRE v. THE QUEEN.

To the Editor of the LEGAL NEWS:

It is time to give back to this case its original title. Mr. Doutre was not a defendant in a penal case, as *The Queen v. Doutre** might imply, but was plaintiff, claiming from the Dominion Government proper remuneration for his services, before the Halifax Fisheries Commission, in 1877, under the Washington Treaty of 1871.

This being done, let us sum up the bearings of the judgment of the Privy Council, of the 12th July, 1884. (7 L. N. 242.) The following points seem to be now well settled:

1. The remuneration of a lawyer, wherever his services are rendered, is regulated by the law of his domicile, and the rules of his own bar.

2. The same law and rules determine his power to contract and to sue for fees and expenses.

3. The *quantum meruit* is the rate of his remuneration, where there is no express or implied contract to limit it.

In substance that decision is in conformity with the spirit of the jurisprudence of Canadian Courts, especially those of Quebec and Ontario.

Having weighed and closely examined the Canadian precedents, in order to sustain Mr. Doutre's position, I know what can be extracted from any particular case, to impeach the conclusion herein summed up; but I repeat that the substance of Canadian decisions is to be found in the judgment of the Privy Council.

* * Before the Supreme Court and the Privy Council the cause took the title *Reg. v. Doutre*, the Crown being the Appellant.—Ed.

The principles regulating the English and French bar had the effect of raising, in some minds, doubts which have found expression on the bench, here and there; and it is fortunate that the true doctrine has at last received a final consecration, in accordance with the law common to citizens at large.

Wherever tariffs are made, with legal sanction, they constitute an implied contract between counsel and client, in the cases provided for. To alter or supersede that implied contract, it requires another contract, which must be proved according to the common law rules of evidence. For instance, in Lower Canada, no contract, the object of which exceeds \$50 in value, can be proved by oral evidence, if there exists no *commencement de preuve par écrit*.

The builder who constructs a house requires no written contract to obtain, in Courts, the value of his work and material. The *quantum meruit* will determine the amount of his claim.

The tariff does not provide for criminal or arbitration cases. Even in judicial arbitrations, lawyers are not expected to act. If they do, there is an implied contract that the value of their services shall be paid, on the same principle as in the case of the builder. In such cases, the builder or the lawyer requires no verbal or written agreement. It is the other party that requires an agreement to limit the *quantum meruit*. And this is the principle applied in the case of Mr. Doutre by the Exchequer and Supreme Courts, and by the Privy Council.

Of all the opinions expressed by the dissenting Judges of the Supreme Court, that of Justice Gwynne is the only one which was particularly noticed in England; and for those present at the argument, the weight of that opinion looked quite formidable, until the decree disposed of it. The pardonable error of date it contained did not affect its merits in the least. J. D.

It is stated that the cases unheard in the English Chancery Division number 700, and in the Queen's Bench Division 1200. A correspondent of the *Times* suggests that a meeting be called of suitors and witnesses to send a deputation to the Lord Chancellor and the Lord Chief Justice at the opening of the Courts, and begin a course of organized pressure for reform.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 17, 1884.

Before DORION, C. J., MONK, RAMSAY, TESSIER
and CROSS, JJ.

BURROUGHS v. MERRIMAN.

*Procedure—Appeal while case is pending in
Review.**The Court will not grant leave to appeal from
an interlocutory judgment while the record
is before the Court of Review on an inscrip-
tion from the same judgment.*

The defendant moved for leave to appeal
from an interlocutory judgment dismissing
a declinatory exception.

The plaintiff opposed the application and
produced a certificate showing that the case
had been inscribed in Review by the defend-
ant on the same judgment.

The COURT ruled that an application for
leave to appeal could not be entertained while
the case was before the Court of Review.

Motion withdrawn.

Robertson, Ritchie & Fleet for the defendant
moving.

C. S. Burroughs for the plaintiff.

COURT OF QUEEN'S BENCH.

MONTREAL, February 21, 1884.

Before DORION, C. J., MONK, RAMSAY, CROSS &
BABY, JJ.BAKER (deft. below), Appellant, and LEBEAU
(plff. below), Respondent.*Master and Apprentice—Breach of contract.*

*A contract of apprenticeship will be annulled if
it appear that the apprentice has not a fair
• opportunity of acquiring proficiency in the
art which the master engaged to teach him.*

The action was brought by the respondent
complaining that the appellant had not
carried out an agreement entered into in
1879, by which the appellant undertook to
instruct the respondent's minor son in the
art of ornamental engraving and the manu-
facture of rubber stamps. The terms of the
engagement were: "To teach or cause him

to be taught and instructed in the manu-
facture of rubber and embroidery stamps
and in the art of ornamental engraving as
fast as he, the said apprentice, may prove
himself capable of learning or taking up the
same." The father complained that Baker
had not fulfilled the obligation assumed;
that engraving is a difficult art, requiring
several years of constant practice before it
can be undertaken as a business, whereas
the manufacture of rubber stamps is not an
art, and requires only a few days' study;
that Baker had kept young Lebeau employed
in making stamps, and had not taught him
ornamental engraving; in fact, that very
little engraving was done in his establish-
ment. It was therefore asked that the in-
denture of apprenticeship be annulled.

The defence was that there had not been
a breach of the contract; that appellant had
taught the apprentice as rapidly as the ca-
pacity of the latter permitted.

The action was dismissed in the Superior
Court on the ground that the specimens of
work executed by the apprentice showed, in
the opinion of experts, that he had made
satisfactory progress for the time he had been
apprenticed.

The case was then taken to Review, and
the judgment was there reversed, the court
being of opinion that the apprentice had not
been afforded a sufficient opportunity to
practice the art of engraving, and that five
or six years' assiduous practice was neces-
sary. The agreement was therefore annulled.
The defendant appealed from this decision.

Archibald, for the appellant, submitted
that the contract was widely different from
contracts of apprenticeship in France or
England, where the apprentice usually is not
only not paid for his services, but gives a
considerable premium to his master. The
obligation of the appellant was to have his
apprentice taught the art of making rubber
and embroidery stamps, and also the art of
ornamental engraving. It was not denied
that the former had been sufficiently taught,
nor was it pretended that young Lebeau had
not made considerable progress in the art of
engraving on metals; but the complaint
seemed to be that he was not furnished the

opportunity of devoting himself constantly to the study of ornamental engraving. It was submitted that this was not the correct interpretation of the contract, and that the teacher must be allowed to exercise some discretion as to the order and manner of the studies. The object of the action was to break the indentures, and after the judgment in the Superior Court dismissing the action, Lebeau had actually deserted from the service of his master.

Geoffrion, for the respondent, contended that the apprentice had not a fair opportunity to acquire the art of ornamental engraving. Young Lebeau had been apprenticed more than two years when the action was brought, and his progress in the art was very small.

Ramsay, J. By deed of indenture of the 7th August, 1879, the respondent apprenticed his minor son, *Théophile*, then aged 15 years, to appellant for five years and ten months, to date from the 1st day of the current month. The obligations of the appellant were to teach or cause him (the apprentice) to be taught and instructed in the manufacture of rubber and embroidery stamps, and in the art of ornamental engraving, as fast as the said apprentice may prove himself capable of learning or taking up the same. The appellant further agreed to pay the apprentice a salary gradually rising at a rate of from \$3 a month in the first year to \$14 in the sixth year.

On the 24th January, 1882, that is about 18 months after the beginning of the term of apprenticeship, the respondent brought an action to set the deed aside, the appellant not having fulfilled the obligations of the deed. The allegations in support of this demand succinctly stated are that appellant had kept the apprentice at work on the simpler part of his business, namely, in the making of the rubber and embroidery stamps, which is not really an art, but an operation easily learned, whereas he never taught him to engrave on metals, and gave him no reasonable opportunity of learning this art, which is really difficult to learn and the knowledge of which is a valuable acquisition.

The plea was the general issue, and a good many witnesses were examined to show on

one side that appellant's business was small, and did not afford facilities for learning the appellant's trade; that the apprentice was adroit and could learn quickly, and that he had not learned as rapidly as a person of his aptitude should have done, and on the other hand, that he had made reasonable progress for the time, even in the difficult art of engraving, and that he had fair opportunities of learning the trade of appellant.

The first thing to be considered is the nature of the contract of apprenticeship, and whether the appellant had undertaken any special obligations by the terms of the deed. The respondent seemed to attach some importance to the words "to teach or cause the apprentice to be taught as fast as he, the said apprentice, may prove himself capable of learning or taking up the same." I am not of opinion that these words add anything to the obligations of the master. They express a reserve which seems to be implied by the law, that the master shall not be obliged to teach more than the apprentice can learn. (*Wood's Law of Master and Servant*, 69.) The duties of the master set forth in the indenture must be substantially performed. (*Wood*, 68.) In the absence of any obligations beyond those of the common law it seems that, both in France and in England, the master must teach or cause to be taught the principles of his profession and give the apprentice reasonable opportunity to learn it. Having done that he has fulfilled his obligation. (*Sébiro & Carteret* *vs.* *Apprenti*, No. 20; *Fraser*, 468.) These questions are eminently subject to the discretion of the court, and the decision arrived at should not be readily interfered with. (*Sébiro & Carteret* *vs.* *Apprenti*, No. 28.) It will readily be admitted that an apprentice should be held strictly to his bargain, else dishonest people might gain undue advantages by having their children taught the rudiments of a trade and then allowing them to desert their employment. On the other hand, it would be very cruel to make a youth waste five or six years of his life at low wages without prospect of any compensating advantage in the future. Here we know from the appellant's own evidence that he had no engraving business worth speaking of, and therefore that the youth

could have no opportunity of acquiring proficiency in the art. It is said in answer to this that the boy had been employed in the place before the indenture, and that he knew exactly what kind of business was done. I cannot think this is an answer to the warranty of the deed that he would give him a fair opportunity to learn engraving, taking with it the evidence that not only there was no business going on in the shop, that the master was in such health he could not execute work of the kind, and that he had no man to take his place. So far as we know appellant had nothing but apprentices. He speaks of work being done by them, but never by journeymen, or people supposed to know the business, and he was little in his shop, being either out or ill. On the other hand, it is proved that the apprentice had made some progress in engraving, and two witnesses say that it was fair progress for the time he had been at Baker's (two and a half years), while Dawson says it was not. The boy had been examined to establish that he had peculiar aptitude for work of the sort, and that he had been taught drawing, which enabled him to learn quickly. I don't think his evidence is admissible in the suit. It is his own suit, and even if it were admissible, his opinion of his own capacity might be just, but it is hardly calculated to produce much effect on the minds of others. Again, it has been said, with some reason, that the boy had been making plans, sometime before the institution of the action, to leave his employment, and to start for himself in the same sort of business. He asked another apprentice (Cantwell) to leave with him, and told him they would make more money. But it appears that he did not pretend to do the engraving work, and that he reckoned on getting a man who was an engraver to go with him. This is not very conclusive either way. It may be that the boy, finding he gained no experience, intended to take some other means to learn the trade he intended to follow, or it may be he meant to end his indentures. Again, his running away after the judgment in the Superior Court was against him, is not reassuring; but, again, it may be argued that if the appellant was not fulfilling his contract with the boy, the latter

was justifiable in refusing to throw away more of his time. It has been said the master was not put *en demeure* and that he ought to have been called upon to give more complete instruction. The action was putting *en demeure*; it was brought before the boy left, and there was no tender by the plea to give further instructions.

Judgment confirmed, Cross, J., dissenting.

Archibald & McCormick for Appellant.

Geoffrion, Rinfret & Dorion for Respondent.

SUPERIOR COURT.

[District of St. Francis.]

SHREBROOK, Sept. 10, 1884.

Before BROOKS, J.

LEONARD et al. v. ROLFE et al.

Procedure—47 Vic., (Q.) cap. 8, s. 2, ss. b.

The 47th Vic., cap. 8, has not repealed 46th Vic. cap. 26, s. 1, so as to deprive the Superior Court of the right of hearing and disposing of proceedings incidental to the hearing and trial of cases on any juridical day.

PER CURIAM. The defendants suggest, upon an inscription for hearing on a demurrer to defendants' second plea, that this Court had no jurisdiction on the day fixed for such hearing, inasmuch as said day is not a day in term; that 47th Vic., cap. 8, sec. 2, subsection b, conferred the right to try only those cases inscribed for *enquête*, for hearing, or *enquête* and final hearing; that 46th Vic., cap. 26, s. 1, is repealed by the Act of last Session, and said Act, which says: "Every juridical day is deemed to be a term day for the trial and hearing of cases before the Superior Court and Circuit Court, whether they are inscribed for proof or for hearing, or for proof and hearing at the same time," or as it is in the French version: "Tout jour juridique est réputé jour de terme pour l'instruction et l'audition des causes tant devant la Cour Supérieure que devant la Cour de Circuit, qu'elles soient inscrites pour enquête, ou pour audition, ou pour enquête et audition en même temps," does not confer the right to hear and determine incidental proceedings; i. e.: defendant says the 47 Vic. has reversed the rule of proceedings which obtained under 46 Vic.; that

while before the Act of last Session you could only hear out of term incidental proceedings, now you can only try cases inscribed for *enquête*, for hearing, or for *enquête* and hearing at the same time; that the legislation has been retrograde, and that the great boon which was conferred by the legislation of 1883, facilitating proceedings and obviating delays, has been taken away, and that we can now have out of term only the taking of evidence and final hearing of cases upon the merits. Without commenting upon the expression in the Statute, "Every judicial day is deemed to be, *réputé*, a day in term," instead of saying "*is*" or "*shall be*"; we must consider the exact meaning of the words of the Act, and the intention of the legislature, as it is a question of interpretation.

The words in English are *trial and hearing*, in French *l'instruction et l'audition*. Now if you can try a cause on a certain day, can you not do what is incidental and necessary to that trial? The word *trial* is made to correspond with *instruction*. I cannot for a moment think that the legislature intended to do what the learned counsel who makes the suggestion contends it has done, to confer upon the Court the right out of term to try a case upon the merits and deprive it of the right to decide what is of less importance, the incidents of the trial.

Let us see what the practical result or application of the interpretation contended for by the defendant would be. A case is inscribed for *enquête* and final hearing. Witnesses are summoned on both sides and in attendance. When either plaintiff or defendant desiring delay or postponement makes a motion upon some incidental matter, the Court would be unable to decide the motion, and the whole case would be continued until the term, i. e., supposing that under sec. 2 of 47th Vic., cap. 8, we have any terms. The word *instruction* is thus defined by Ferrière, Dict. de Droit et de Pratique, vo. Instruction: "Instruction se dit des procédures et formalités qu'on fait pour mettre une affaire en état d'être jugée. Mais on se sert ordinairement de ce mot pour signifier les procédures qui se font depuis l'assignation jusqu'à l'appointement. Il y a même encore des instructions

jusqu'au jugement définitif du procès, comme les lettres de rescission, les inscriptions de faux, et les demandes incidentes." In the ordinary acceptation *instruction* is defined as direction, preliminary proceedings, examinations, proceedings, trial, from *instruire* to examine, to prepare for trial.

In our Code de Procédure it is true that the word *instruction* is used as it is translated in the 47th Vic., and also in the 46 Vic., cap. 26, s. 2: *Toutes causes inscrites seront instruites*, which is certainly using the word in a limited sense and not giving it its full meaning.

But even if you were bound by this interpretation another principle comes in: Shall we give the Act the construction evidently intended by the legislature, or shall we restrict it? "*Qui hoeret in litera hoeret in cortice*." It is not the words of the law, says the ancient Plowden, "but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul."

I do not mean to say that we can give to words an interpretation wholly different from their meaning, but the Court shall, if it can, by giving a fair construction to a statute, carry out the intention of the legislature that enacted it. What was the intention of the legislature as expressed by 46 Vic., cap. 26, s. 1? Every day was deemed to be a term day to hear and try all incidents to a cause, but not the cause itself upon its merits. This was repealed, and now they say you may hear and try all causes however inscribed, and in so saying the legislature evidently did not intend to restrict, but to enlarge the provisions of 46 Vic., cap. 26, and they undoubtedly, in the enactment of 47 Vic., intended that the greater should include the less, and that the power to try should include, as it must necessarily include (or our whole system would be a failure), the power to pass upon all matters incidental to trial. Holding this, I must declare that this Court has power, under 47th Vic., cap. 8, s. 2, sub-sec. b, to hear and determine on any juridical day all matters incidental to the trial of cases.

L. E. Panneton for Defendant.
S. A. Hurd for Plaintiff.

COUR SUPÉRIEURE.

MONTREAL, 30 mai 1884.

Coram LORANGER, J.

ERNEST DESROSNIERS V. JOSEPH LEBEARD.

Action en dommages—Art. 1053, C. C.—Identité de la personne diffamée dans un article de journal.

PER CURIAM. "La Cour, etc.

"Attendu que le demandeur, avocat de la cité de Montréal, se plaint que le défendeur, éditeur du journal "Le Monde," aurait, le 7 novembre 1883, publié et imprimé dans ce journal et mis en circulation un article intitulé: "*Toujours le même*," et se lisant comme suit: "Un avocat qui a pourtant eu assez de leçons pour apprendre à respecter les gens, vient encore de s'en faire donner sur les doigts. Il s'était permis de tenir des propos injurieux au sujet d'une dame respectable, pensionnaire de l'hôtel du Canada. Un jeune homme, agent d'assurance, qui connaissait très-bien la dame en question, le fit taire; l'avocat persista; alors le jeune homme, indigné, le saisit et le força d'aller demander pardon à la victime de la calomnie. Après quelque résistance, notre homme dut s'exécuter, mais malheureusement, la dame n'était pas à l'hôtel. L'avocat descendit alors et courut faire sa plainte à la police; il y avait un assaut, mais le jeune homme s'estima heureux de payer \$5.00 et d'avoir tenu l'honneur d'une femme sauf;"

"Attendu que le demandeur qui réclame par la présente action, des dommages au montant de \$250, allègue que cet article était dirigé contre lui et n'était que la suite d'un système de diffamation, d'injures et de calomnie suivi à son égard par le même journal, qui aurait, quelque temps auparavant, publié un autre écrit diffamatoire contre le demandeur, lequel écrit ayant été subéqueusement reconnu faux par le défendeur, aurait été rétracté par écrit;

"Attendu que le défendeur a plaidé que les faits rapportés dans l'écrit dont le demandeur se plaint sont vrais, qu'ils se sont passés dans un endroit public, ainsi que l'allègue la déclaration; que ces faits ont été publiés de bonne foi, sans malice et nullement dans le but de causer du tort au demandeur ou à

qui que ce soit; que le défendeur, comme journaliste, avait le droit de publier l'article en question dans le but de faire voir au public le sort qui attend ceux qui tiennent des propos injurieux sur le compte des femmes, en même temps que la punition réservée à ceux qui interviennent pour châtier les délinquants que les tribunaux seuls sont chargés de punir; laquelle défense est suivie d'une défense en fait;

"Considérant qu'il résulte, tant des circonstances qui ont précédé la publication de l'écrit en question que de la publicité donnée au procès qui aurait été jugé à la cour de police, dans lequel le demandeur était mentionné comme partie plaignante, que le défendeur a voulu diriger et que, de fait, il a dirigé contre le demandeur le dit écrit et l'a suffisamment désigné pour que le public comprit que l'avocat dont il est question dans le dit écrit, était le demandeur;

"Considérant que l'écrit en question est injurieux, diffamatoire et propre à nuire la réputation du demandeur;

"Considérant que le défendeur a plaidé que les faits allégués dans le dit écrit étaient vrais et qu'il n'a fait aucune preuve de ces faits; qu'il n'est point prouvé que dans les occasions relatées dans le dit écrit, le demandeur se soit servi du langage calomnieux ou diffamatoire qui lui est reproché;

"Considérant qu'en plaçant la vérité de ces faits et en n'en faisant aucune preuve, le plaidoyer du défendeur constitue une aggravation d'injure;

"Considérant que le dit écrit a été publié sans cause ni raison, se rapporte à des faits de la vie intime que le public n'a aucun intérêt à connaître, et que la publication de semblables écrits constitue un abus de la liberté de la presse et des privilèges réclamés par la défense;

"Considérant que le demandeur a droit à une réparation, et prenant en considération toutes les circonstances de la cause;

"Condamne le défendeur à payer au demandeur la somme de \$50 courant, avec intérêt de ce jour et les dépens de l'action telle qu'intentée, distraits à MM. Lareau et Allard, avocats du demandeur.

Lareau & Allard, avocats du demandeur.

Globenski & Poirier, avocats du défendeur.

LITERARY PROPERTY.

We are glad to see that lectures, even when delivered orally, are within the protection of the law, and that persons publishing them for profit without the consent of the lecturer can be restrained by injunction. Mr. Justice Kay, following the law laid down by Lord Eldon in *Abernethy v. Hutchinson* (3 L. J. O. S. 209, Ch.) has thus decided in the recent case of *Nicole v. Pitman*. The lecture in question was delivered orally at a college by the plaintiff, who before delivery had committed it to writing. The defendant attended and took the lecture down in shorthand, and subsequently published it in shorthand characters. It certainly seems only in accordance with justice that a person who has devoted time and learning to amassing the necessary material for a lecture should be protected from having it published by any person who is capable of writing shorthand. It is to be noticed that in this case the lecture, prior to delivery, had been reduced into writing, and it was therefore contended that the plaintiff had a copyright in it, which he was entitled to have protected. Lord Eldon's decision in *Abernethy v. Hutchinson* (*ubi sup.*) however, goes further than this, his Lordship there deciding that a person orally delivering a lecture, even though it has not been committed to writing, is entitled to an injunction to restrain other persons from publishing it. According to Lord Eldon there is an implied contract between the lecturer and his audience that, while they may make the fullest notes for their own personal use, they may not publish them for profit. Even putting aside this implied contract, a lecturer might well argue that he had such a property in his lecture, even though it be not committed to writing, as to entitle him to relief against piracy. A lecture which is not committed to writing differs from a literary composition only in the way in which its subject-matter is conveyed to the knowledge of the public. In the one case it is the voice, in the other printed characters. The language and sentiments, which are the substance of the matter, are in both cases the same. This case was somewhat anomalous from the fact that the publication complained of was in shorthand characters. This was somewhat relied upon by the defendant, but the learned judge, not unnaturally, refused to be influenced by a circumstance, the only practical effect of which is to limit the number of readers of the publication.—*Law Times*.

GENERAL NOTES.

Within the past year, no less than twenty-five railway companies, whose aggregate share capital and debt exceed \$550,000,000, have gone into the hands of receivers. An application for the appointment of a

receiver for a railway company, is no longer a rare proceeding in our courts; mismanagement may account for this fact in a large degree, but it is no doubt also very largely owing to the rapid multiplication of railroads in sections of the country where they are hardly able to secure the business that warrants the outlay of the capital required to construct and operate them at a profit. The coming question with regard to railway management involves the classification of passenger traffic as already adopted in Europe, which will result in cheaper travelling to the public and regular and larger dividends to railway shareholders.—*Buffalo Transcript*.

It not unnaturally surprises many persons that the coins of the realm may legally be melted down and devoted to less dignified uses; but the practice was undoubtedly legalized by 59 Geo. III. c. 49, s. 11, when melting and exporting were treated together, and both expressly permitted. That statute repealed 9 Edw. III., by which the melting of "sterling half-pennies or farthings" was forbidden; 17 Rich. II., c. 1, in virtue of which "no groat or half-groat" was to be melted; and 13 Charles II., by which the same prohibition was extended generally to current silver. There appears to have been no statute forbidding the melting of gold coin, but this was specially allowed in the Act of 1819; and although the act is repealed it cannot be said to be an offence at common law for a man to put his own gold or silver into the melting pot because it happens to be stamped with an impression of the Sovereign's head. If that consideration were sufficient, it would be a misdemeanour to light one's cigar with a sheet of postage stamps. The illegality of melting coin is as old as the *Lex Cornelia*, which forbade melting as well as debasing and "washing"; but according to modern ideas the subject is allowed to test practically whether the sovereign is worth its weight in gold by turning it into Birmingham jewellery, notwithstanding the disrespect shown to the Queen's image and superscription.—*Law Journal*.

The following case of liability for an ill-disposed cat is noted in the *Law Journal* (London):—"At the Marylebone County Court, on May 19, before Mr. H. J. Stonor, in the case of *Tedder v. Macleod*, the learned judge, in giving judgment, said: In this case the plaintiff claims £2 as damages for the destruction of certain chickens of a valuable kind by the defendant's cat, which, it was proved, was of a peculiarly mischievous disposition, and had on previous occasions destroyed some chickens of the plaintiff to the defendant's knowledge. The chickens in question were kept in an inclosure of wire which the plaintiff had raised to the height of seven feet in order to protect them against this very cat. Now in the case of *Read v. Edwards*, 34 Law J. Rep. C. P. 31, Mr. Justice Willes was evidently of opinion that damage done by dogs or by cats ought to be regarded in the same light, and he there held that the owner of a dog of a peculiarly mischievous disposition and having a propensity for the destruction of game, to the knowledge of the owner, which had destroyed young pheasants reared under domestic hens in a wood, and therefore with little or no protection, was liable for the same, and it appears to me that the present is a much stronger case against the defendant, and that the plaintiff is clearly entitled to a verdict for the damages claimed. Judgment accordingly.

The Legal News.

VOL. VII. SEPTEMBER 27, 1884. No. 39.

GOVERNMENT BONDS. — PREMIUM PAYABLE ON CHANCE.

A question of some interest was decided recently by the New York Court of Appeals in the case of *Kohn v. Koehler*. The question was whether Austrian Government bonds, on which there was a premium payable upon chance, could be considered a lottery. The action was brought under a rather peculiar provision of the Revised Statutes (2 R. S., § 6 Ed. 923), which declares that "any person who shall purchase any share, interest, ticket, certificate of any share or interest, or part of a ticket, or any paper or instrument purporting to be a ticket, or share, or interest in any ticket, or purporting to be a certificate of any share or interest in any ticket, or in any portion of any illegal lottery, may sue for and recover double the sum of money, and double the value of any goods or things in action which he may have paid or delivered in consideration of such purchase, with double costs of suit." The bond in question provided for the payment of the sum of one hundred gulden by the Austrian government, in accordance with the conditions indorsed on the back of the same, together with one fifth part of any such sum as may be allotted to the prize number of the bond, which sum must amount to at least one hundred and twenty gulden, with interest as provided. Under the rules and regulations indorsed on the bond, relating to the drawing and redemption of the bonds, of which the one in question constituted a part, provision was made for the drawing of the bonds by a division into series, and the drawing of a certain number of series tickets to be deposited in a wheel to await the drawing of the prize numbers. At a time named a drawing was to be had from the series numbers, and provision was also made for the drawing of the prize numbers deposited in another and separate wheel, and the last named drawing

designated the numbers which were entitled to prizes, which prizes varied from six hundred gulden to 300,000 gulden. Under the terms of the loan for which the bonds were issued, the holder was entitled to receive his principal and interest and a premium of twenty per cent, and what was termed a prize, if by the drawing provided for he became entitled to the same. The bonds referred to were issued by the Austrian government for the purpose of obtaining a loan of money, and the holders or owners received the same upon payment of the amount of principal therein named. The evident object of the government in issuing the bonds was to obtain money for its own use and benefit.

The Court said: "According to the true interpretation of the instrument, the government, upon receiving the money, promises to pay the principal, interest and premium named, and in addition any sum which may be drawn by the holder of the bond, in accordance with the rules and regulations indorsed upon the same. This additional sum depends upon a contingency which is to be decided by lot or chance. Independent of this the amount and the terms are fixed by the conditions of the bond. The substance of the transaction relates to a loan of money to the government and the provision made for its payment. This is the main object and purpose for which authority was given to issue the bonds, and they were disposed of evidently, having this in view. The provision by which, upon a certain contingency, the holder of the bond might receive an additional sum, was, no doubt, an inducement held out for the purpose of obtaining money on the same, but it did not constitute the main feature and the substance of the transaction between the government and the purchaser of the bond. It was a mere appendage and an incident to its main purpose, by means of which the holder might by chance receive a larger sum than the principal, interest and premium which the bond itself provided for."

The Court, upon these facts, was of opinion that in loaning money on these bonds the holder runs no risk of loss, and he took the chance which might arise in case it should

be determined by lot that his bond was entitled to a larger sum than the principal, interest and premium, which he was sure to get in any event. While this latter privilege depended upon chance, it did not convert the bonds into lottery tickets.

IMMUNITY OF ARBITRATORS.

The question of immunity of judges came up in a new form in the recent case of *Hoosac, etc., Co. v. O'Brien*, before the Supreme Judicial Court of Massachusetts. The plaintiffs alleged that their own physician Sprague, a lawyer named O'Brien and one Hogan conspired to defraud the company. Hogan was injured by an accident and placed under the care of Sprague who, it was alleged, fraudulently induced Hogan to pretend that he was much more severely injured than in truth he was, and to refuse suitable nursing and food to prevent his rapid recovery. An action of damages which had been instituted by Hogan against the company was referred under a rule of court to Sprague and two others. The referees united in an award against the company of \$3,600, on the ground that Hogan was permanently injured. The award was paid and it was alleged that Sprague and O'Brien (the plaintiff's lawyer) retained to themselves \$1,600. The company averred a conspiracy to defraud, and sued Sprague and O'Brien to recover the amount. Sprague demurred and the Court sustained the demurrer on the ground that he acted as arbitrator. Chief Justice Morton said:—"The principle is too well settled to require discussion, that every judge, whether of a higher or a lower court, is exempt from liability to an action for any judgment given by him in the due course of the administration of justice. *Yates v. Lansing*, 5 Johns. 282, and 9 Johns. 395; *Pratt v. Gardner*, 2 Cush. 63, cited. A similar immunity extends to jurors. The question whether a like immunity extends to arbitrators seems never to have arisen in this Commonwealth. An arbitrator is a quasi-judicial officer under our laws exercising judicial functions. There is as much reason for protecting and insuring his impartiality, independence and freedom from undue influences as in the case of a

judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him. *Jones v. Brown*, 54 Iowa, 74. It follows that this suit cannot be maintained against the defendant Sprague, and his demurrer must be sustained."

O'Brien also demurred, but his demurrer was overruled. The Chief Justice said:—"The demurrer of the defendant O'Brien presents a different question. The immunity from actions extended to Sprague on grounds of public policy does not protect O'Brien. If a lawyer who brings a suit, by suborning witnesses, by bribing the judge, jury or arbitrators, or by other corrupt and illegal practices, procures an unjust judgment against his adversary, we know of no legal reason why he should not be responsible for his illegal acts to the party injured. He is not exonerated because, for reasons which do not apply to him, a joint tortfeasor cannot be reached. *Rice v. Coolidge*, 121 Mass. 393. The defendant contends that the judgment founded on the award cannot be impeached, and that it is conclusive on the plaintiff, and while unreversed prevents him from maintaining this action. This argument is founded upon a misapprehension of the effect of the former judgment. The parties in this suit are not the same as in the former suit. The plaintiff in this suit does not impeach the former judgment; on the contrary, the plaintiff relies upon it and the fact that it is conclusive as between it and Hogan, is the foundation of its claim against O'Brien. The plaintiff may have to try in this suit, one of the issues involved in the former suit, viz: the extent to which Hogan was injured, but this furnishes no reason against maintaining this suit."

CONSOLIDATION OF STATUTES.

To the Editor of the LEGAL NEWS:

May I, through the columns of your paper, suggest to the commissioners appointed to consolidate and revise the statutes of Canada, a change in their mode of redaction, which I am sure would be a great benefit both to the bar and the bench and which would

give but a little more work to the commissioners?

That is this, instead of putting in margin of the sections of chapters a synopsis of their contents, as it is now written in our statutes, I propose to do what is done in Revised Statutes of Massachusetts and I suppose also in other states, that is, to place at the head of every chapter a synopsis of the contents of every section, so that at a glance a person will be able to see all the matters contained in such chapter, and to place in margin of every section, notes referring to decisions of the Courts interpreting such sections, which have been reported. This would save a great deal of labor to those interested in hunting up precedents, to find out the true meaning of the text of the law.

Respectfully yours,

C. PACAUD.

Montmagny, Sept. 25, 1884.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 23, 1884.

Before DORION, C. J., MONK, RAMSAY
and CROSS, JJ.

RAE (plff. below) Appellant, and LA COMPAGNIE DU CHEMIN MACADAMISÉ DE LAPRAIRIE (deflt. below), Respondent.

Contract—Measurement of stone.

The question was whether the measurement of stone should be before or after it was broken. Held, that although the general practice was to measure it after it was broken, yet the circumstances might lead to a different inference, and as the only reliable measurement in this case was made before the stone was broken, and the matter was determined in favor of that measurement by the inspector named under the terms of the contract to settle the value of the work, the contractor was bound by that measurement.

CROSS, J. Mr. Rae is the transferee of Parker, a contractor for the macadamizing of three miles of the company's road at Laprairie. He claims \$1,600 as balance due him under the contract.

The defence is that the company only owe

\$429.18, which was tendered before action brought, and the judgment goes only for the tender, with costs of contestation against Rae, who appeals from the judgment.

By the contract Parker was to be allowed \$5 per toise for breaking the stone, \$3 per toise for carting it and putting it on the road, and 25 cents per yard on the lineal extent of the road macadamized.

The controversy turns chiefly on the question whether the stone should have been measured before or after it was broken. The weight of evidence goes to show that it is the custom to measure the stone after it is broken, but much depends on the terms of the contract and the circumstances of each case. In this instance the stones were purchased from the farmers along the line of the road. They were measured as purchased, in their unbroken state, and no other measurement of them was made until the road was finished, when a measurement was made of the macadam on the road, necessarily imperfect and uncertain from the difficulty of measuring its thickness, the width, too, not being uniform, so that really but one reliable measurement was made, and that was of the stones before they were broken.

One of the company's pretensions, which should have been mentioned before, was that the finishing of the road was delayed a whole year after the time promised, and a penalty of \$10 per day was stipulated for delay on this head, but the company on this pretension reduced their claim to the amount of the interest for one year on an advance of debentures before Parker was entitled to them; they consequently limited their demand for damages to the amount of the year's interest on the debentures delivered by anticipation.

To this demand for damages Rae says that Parker was never put *en demeure*, and consequently was not subject to the penalty under Art. 1134; but in this case time was made an express condition of the contract, and no penalty is really asked. The interest is no more than a matter of account, for which the contractor is fairly bound by the payment being anticipated.

The primary question seems decisive. The contract contained a provision (Sec. xvii,

latter part of § 3) which declared that "la valeur des travaux sera constatée par l'inspecteur que la compagnie aurait droit de nommer." The company named Mr. Beaudry inspector; and he determined the whole matter. It is contended he went beyond his functions, but it seems to me that the object of his nomination and the provision in the contract were to determine to what amount work had been done according to the terms of the contract. He allowed for the work as if the stone had been measured before being broken, and there are circumstances to support this view. The stone was purchased by the company from the farmers along the line of the road, and had a suitable measurement as piled by them. It was by the company furnished to the contractor as so many toises. He may be presumed to have broken the stone according to the toise measure by which it was delivered to him, and no other reliable measurement having been made, it seems to me this measurement must stand, although it may possibly work a hardship to the contractor. He seems also to complain of the result, having, as he pretends, been promised that he would lose nothing by the contract. This may be so, but there is no legal proof of it, and as regards the damages, he was certainly in default as to time, and what the inspector allowed should stand. He is allowed \$150 for extra work, which he could not have recovered for want of a writing had it been disputed. I would allow the judgment to stand.

Judgment confirmed.

Robidoux & Fortin for appellant.

Loranger & Beaudin for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, September 23, 1884.

Before DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

COURNOYER-PAULET et al. (defts. below), Appellants, and GUEVREMONT (plff. below), Respondent.

Servitude—Dam—Rights of proprietor of inferior lands.—C. S. L. C., cap. 51.

The proprietors of inferior lands on a stream have an action of damages against the proprietor of the superior lands for any inter-

ference with the flow of water which aggravates the servitude to which the inferior lands are subject.

The appeal was from a judgment rendered by Mr. Justice Gill in the district of Richelieu, condemning the appellants to pay \$40 damages caused by the flooding of respondent's land. The action was instituted in the first place in the Circuit Court, for \$99, and was evoked to the Superior Court. The appellants are owners of a mill on the 1st River Pot-au-Beurre, in the Parish of Sorel, which mill is worked by the water of the stream, and the damming of the water, it was alleged, caused the respondent's fields in the vicinity to be flooded and part of his hay to be injured. The judgment of the court below held that chapter 51 of the Consolidated Statutes of Lower Canada does not deprive the owners of lands lying along streams of the common law right to claim damages caused by mill-owners erecting dams for the purposes of their mills.

RAMSAY, J. This suit seems to have been got up to illustrate all the evils which may be made to attend on our extraordinary system of practice. It certainly cannot have been instituted or carried on for any practical advantage to either of the parties. We have loose pleading, no settled plan of attack or defence, in other words no conception of legal rights, and a consent *enquête* at length about everything and anything, elaborated by the intelligent speculation of the short-hand writer.

The action is for damages done to hay on 10 or 12 acres of very low-lying land at the mouth of a creek known as the Rivière Pot au Beurre. The story of the appellant is this, that his men went to cut hay on the 15th of August, 1880, that they worked three days and cut 900 bundles, that on the night of the 17th, the weather being beautiful, they went to sleep in the barn on the land, and that when they awoke in the morning there was a high wind and the water was lapping against the sills of the barn, and when they went out they found that the river had risen four feet and inundated the land and destroyed or greatly injured the hay, and they say the damage amounted to \$200. They also depose that the cause of the damage was

the use made of the water by the defendants, who are mill owners on the creek. That in summer, not having enough of water to drive their mill continuously, they retain the water by a dam, and then let it escape, by spurts, when they have grain to grind. This, plaintiff contends, is an aggravation of the natural servitude to which the lower land is subject, and that it is the direct cause of the damage.

The defendants contend that they have only used the water according to their right; that the superior proprietor is entitled to use the flowing water passing through his land, and that his only obligation towards the inferior proprietor was to return the water to the river before it reaches his land; and add, that there is no instance of an action of this sort by the inferior proprietor, and no law to support it. As a matter of fact, they contend that the flooding of plaintiff's land is in no way attributable to them or their acts; that the flood described could not have been occasioned by any use they had made of the water, and that in any case the thing which determined the damage was the neglect to keep the mouth of the river clear of obstructions, which was due to the refusal of plaintiff to allow the ordinary works to be performed opposite his land. They further contend that defendants' work had been in existence for fifty years, and always existed in its present state, and that therefore it was too late now to object to their using their property in the way they had always done.

If the appellant had no other ground of defence than this, that the inferior proprietor had in law no such action as the one he has brought, his appeal would be easily disposed of. There is perhaps no branch of the law which has longer and more continuously occupied the attention of jurists in all parts of the world than the right to the use of water, and the injury any interference with it might occasion; and difficult as the application of the law may be in practice, its general principles are not doubtful. The right of action of the proprietor of the inferior land against the proprietor of the superior land is identical with that of the latter against the former, as the following texts of the Roman law decide: Dig. Bk. xxxix, Title. III., §§ 8, 10 and 13.

It is unnecessary to examine the last defence put forward by appellants, for it is not pleaded. There is no special issue before the court as to whether appellants have acquired rights by the acquiescence of the neighbouring proprietors. I may further add that the much misunderstood citation from the C. S. L. C. in no way applies, for what respondent seeks is an indemnity in the shape of damages.

We are, therefore, reduced to a simple question of fact, whether the dam erected by the appellants has aggravated the servitude of the lower land so as to create any appreciable damage. The court below decides that it has done so to the trifling amount of \$40, and by its judgment has reduced the costs by the taxation, assignation and depositions of Nelson, Aubuchon, Fr. Lemoine, J. B. Lemoine and Ethier, whose testimony is declared to be totally useless, and one-third of the costs of the depositions of the rest of plaintiff's witnesses, owing to their useless prolixity. If there was a little more of this discrimination as to costs, it would probably have a beneficial effect on our practice.

It appears to be satisfactorily proved that plaintiff's land was flooded on the morning of the 18th August, 1880. But when we turn to the cause of the inundation, there is not the same certainty. There is no positive testimony of an eye-witness who saw the course of the flood, and it is only by the testimony of one of the defendants that we know that the sluice gate was open on the afternoon of the 27th, and till dusk. We have, therefore, only a theory to deal with. The witnesses say the water did not come from the St. Lawrence, the weather was fine, and it must have come from above and by the opening of defendant's mill. As to the fineness of the weather, there is some contradiction among plaintiff's witnesses, but let us take it for granted the flood was not caused by rain, and let it be taken for granted that the water came from the opening of the sluice, we still don't see that plaintiff has made out his case. The best test of plaintiff's theory is its probability. Of this we are as good judges as the witnesses, who had no more facts before them than we have. We know that the sluice has an opening of 14 inches. We also know that the

accumulation of two days' water in summer escapes in twelve hours, that is to say, that the flow of the river by the sluice gate is four times more rapid than the natural flow of the river. Therefore, if the sluice be constantly passing 14 square inches of water, that is equal to 28 square inches instead of 14. Now will any one in his senses pretend that a river 20 feet wide and two and a half or three feet deep could be filled by 28 square inches of water, unless there was some stoppage in the flow, or that such a flow could, if uninterrupted, produce an effect on the neighbouring lands? It would be different if the flow was interrupted by another obstacle, but appellants are not liable for the failure to keep the river open according to the *procès verbal* constituting the river a discharge, and regulating the works to be kept up upon it.

It seems to us to be highly probable that the damage was due to the failure to keep the mouth of the river clear. It is evident that this flooding was not an ordinary occurrence. There were no complaints before in summer from below. But this question it is not essential to decide. It suffices to show that the theory of the plaintiff is untenable. Nevertheless, it may not be amiss to observe, that several of plaintiff's witnesses support this view, or at any rate throw doubts on plaintiff's theory. Ed. Labarre (p. 43) says:—"Je ne puis pas m'imaginer à une distance comme cela, et dans une sécheresse comme cela, rien que la marche du moulin puisse mener tant d'eau pour mouiller tout son foin." Again, at page 48, he is asked:—

Q. "Vous dites donc que si la rivière était nettoyée comme il faut sur la terre du demandeur et dans la débouche dans la Baie Lavallière il n'y aurait pas d'inondation?"

R. "Il ne faut pas se tromper: la terre du demandeur est en débouche, il y a un peu de notre faute au public."

Q. "L'eau séjourne-t-elle, sur la terre du demandeur, parce que la débouche n'est pas nettoyée?"

R. "Il n'y pas d'autre chose, suivant moi. La rivière est bouchée, et quand l'eau est rendue là, elle se répand partout."

At page 49, the same witness tells us that having charge of the creek as syndic he had it

cleared nine years before, and that this is the first complaint in summer since. Benjamin Larochelle fils, says (p. 105) that the river has "*assez de chute*," to run off all the water when the sluice is open and the mill running. This was in examination in chief, and though pressed again on the point he repeats the same thing. At p. 139, Joseph Mathieu, also in examination in chief, attributes the inundation to the absence of "*débouche*." At p. 167, Fra. Lemoine attributes the flood to the river not being "*en ordre*," and Paul Joly at page 199 thinks "*que l'eau devrait s'égoutter facilement, si la rivière était nettoyée*." Again, Jean Baptiste Lemoine, speaking generally, said the mill did no damage below, to the great disgust of the counsel who was interrogating him. The whole proposition became so untenable, except by admitting that the river had not been kept clear according to law, that there was a faint attempt to show that the dam had "*crevée*," but this story, unlike the dam, would not hold water.

It seems to me, then, clear that the plaintiff has not made out his case. Having arrived at this conclusion it becomes unnecessary to lose time reading a volume of 158 pages of evidence. I have, however, read some of it, curious to see how so much could be said about so little, and if what I have not read contains no more matter than what I did read, it is not worth reading for any object. In addition to this, the *factum* sets at defiance a rule of practice which has been in force for nearly five years. It is ordered that "the case shall be printed on paper of eleven inches by eight inches and a half, the type to be small pica, leaded face," &c. The type is not "small pica, nor leaded face." The labourer is worthy of his hire, but he should earn it; and if lawyers are to be paid they should attend to their business.

We are, therefore, to reverse, with costs of the lowest action of the Superior Court, and without any costs for witnesses or for the *factum* in appeal. The case was unnecessarily evoked from the Circuit Court to the Superior Court, and we give costs only of the action as brought. The costs of the evidence will not be taxed at all as against the adverse party. The appellant will get his costs but

each party will have to pay the costs of these enormous paper books.

Judgment confirmed, *TESSIER, J.*, dissenting.

A. Germain for Appellants.

J. B. Brousseau for Respondent.

COURT OF REVIEW.

MONTREAL, March 31, 1883.

Before TORRANCE, DOHERTY and RAINVILLE, JJ.

LERIGHER dit LAPLANTE v. PINSONNEAULT.

Action en séparation de corps—Abandonment of matrimonial domicile.

An action en séparation de corps by a husband, based on the sole allegation of abandonment by the wife of the matrimonial domicile, is good in law.

The judgment of the Court, which fully explains the question presented for decision, is as follows:—

“ La cour, etc.

“ Attendu que le demandeur poursuit la défenderesse en séparation de corps ; qu’il allègue que la défenderesse son épouse avait pris contre lui une action de même nature, laquelle a été renvoyée par jugement rendu le 20 octobre 1877, que sa dite épouse avait eu permission de se retirer chez son père pendant l’instance : que depuis le dit jugement déboutant son action la dite défenderesse n’était pas retourné au domicile conjugal malgré que le dit demandeur ait toujours été prêt à la recevoir comme il l’est encore, et qu’elle a toujours persisté encore à ne pas vouloir vivre avec lui ;

“ Attendu que la défenderesse a plaidé par une défense en droit invoquant comme moyens : 1o. qu’aucune des allégations de la déclaration ne constitue en droit un motif ou une cause suffisante pour baser une action en séparation de corps ; 2o. qu’il y a contradiction entre les conclusions et les prémisses en ce que le dit demandeur allègue qu’il a toujours été prêt à recevoir chez lui son épouse et que les conclusions ne déconlent pas des dites prémisses ;

“ Considérant que bien qu’aux termes de l’article 198 du Code Civil la femme dont l’action en séparation a été renvoyée est tenue de retourner chez son mari, sous tel

délai qui est fixé par la sentence ; que bien qu’il ne soit pas allégué que le dit jugement ait fixé tel délai et que de fait il n’en fixe pas, le dit jugement faisant partie de la déclaration, il n’en est pas moins certain qu’en loi la défenderesse était obligée de retourner avec son mari, en autant que d’après les allégations de la déclaration et d’après la loi elle n’était autorisée à se retirer chez son père que pendant l’instance ;

“ Considérant que bien que l’article 197 du Code Civil ne classe que le refus du mari de recevoir sa femme, et de lui fournir les choses nécessaires à la vie comme cause spécifique de séparation de corps, le refus de la femme de retourner chez son mari peut suivant les circonstances, constituer une injure grave et être une cause de séparation de corps ;

“ Considérant que la femme en retournant avec son mari peut faire tomber la présente action ;

“ Considérant qu’aux termes de l’article 199 du Code Civil, le refus de la défenderesse ne fut-il prouvé et persistant, le tribunal pourrait suspendre son jugement pour donner le temps aux parties de se reconcilier ;

“ Considérant en conséquence que l’action est bien fondée et que les allégations en sont suffisantes, et qu’il y a erreur dans le dit jugement du 5 décembre 1882, qui a maintenu la défense en droit et renvoyé l’action ;

“ Casse et annule le dit jugement, et procédant à rendre celui que la dite cour de première instance eut du rendre dans l’espèce, déboute la défenderesse de sa dite défense en droit avec dépens tant de la dite cour de première instance que de cette cour, distraits à maître Thomas Brossoit, avocat du demandeur, et ordonne que le dossier soit remis à la dite Cour Supérieure à Beauharnois.”

Judgment of S. C. reversed.

Thos. Brossoit for Plaintiff.

Laflamme & Co. for Defendant.

SUPERIOR COURT.

MONTREAL, September 15, 1884.

Before JETTÉ, J.

*THE BANK OF BRITISH NORTH AMERICA
v. WHELAN.*

Procedure—Delay to call in warrantors—Vacation.

The delay of eight days to call in warrantors, referred to in C. C. P. 123, does not run during the period between 9 July and 1 September.

This was a hearing on law, on the issue raised by the answer in law filed by the plaintiff to the dilatory exception filed by the defendant.

By the dilatory exception the defendant declared that he had instituted an action in warranty against his warrantor on the 4th of September, 1884.

As the action in warranty was instituted long after the expiration of eight days from the service of the original action, the plaintiff by the answer in law contended that under Art. 123 of the Code of Procedure the exception was bad in law.

At the argument, the defendant invoked Art. 463 of the Code of C. P. as suspensive of the delay referred to in said Art. 123 during the period from the 9th of July to the 1st of September, 1884.

The following was the judgment of the court:—

"La Cour * * * considérant que bien que le défendeur qui veut appeler garant soit mis en demeure d'agir par l'assignation principale à lui faite, et que le délai qui lui est accordé à cette fin compte du jour de telle assignation et non du jour de l'entrée ou rapport de la demande principale, néanmoins il résulte de l'Article 463 du Code de Procédure Civile que tous délais relatifs à la plaidoirie et à l'instruction sont suspendus pendant la période qui s'écoule du 9 juillet au 1er septembre;

"Considérant que relativement à la demande principale, l'institution de la demande en garantie est matière d'instruction et que par suite, la disposition du dit Article 463 s'y applique;

"Considérant que dans l'espèce le défendeur ayant comparu le 1er septembre et institué sa demande en garantie le 4, il s'est pourvu dans les délais requis par l'Article 123;

"Considérant que pour les fins de l'adjudication sur la réponse en droit de la demanderesse, l'allégation du défendeur qu'il a pris sa demande en garantie le 4 septembre suffit pour que le fait soit considéré établi;

"Considérant en conséquence que la réponse en droit de la demanderesse à l'exception dilatoire du défendeur ne saurait être maintenue;

"La renvoie avec dépens distraits à Maitres Doherty & Doherty, avocats du défendeur.

Answer in law dismissed.

Bethune & Bethune for plaintiff.

Doherty & Doherty for defendant.

SUPERIOR COURT.

MONTREAL, March 31, 1883.

Before LORANGER, J.

BROWN v. DEMERS, and DEMERS, petr.

Procedure—Delay—Pétition en nullité de décret.

The delay of service of a petition en nullité de décret is the same as on an ordinary summons as regulated by Art. 75 of the Code of Procedure.

The text of the judgment fully explains the question decided:—

"La cour, etc.

"Considérant qu'aux termes de l'article 715 du Code de Procédure Civile, la procédure sur requête en nullité de décret doit être instruite en la manière et dans les délais des poursuites ordinaires; que sur la signification de la requête au demandeur et aux parties intéressées dans la cause les délais doivent être ceux indiqués par l'Article 75 du dit Code;

"Considérant que dans l'espèce la dite requête, faite rapportable et rapportée le 4 décembre 1882, n'a été signifiée à la demanderesse que le 28me jour de novembre précédent, et que les délais accordés à la dite demanderesse sont insuffisants; qu'aux termes de l'Article 116 du Code de Procédure Civile la présente exception à la forme est bien fondée;

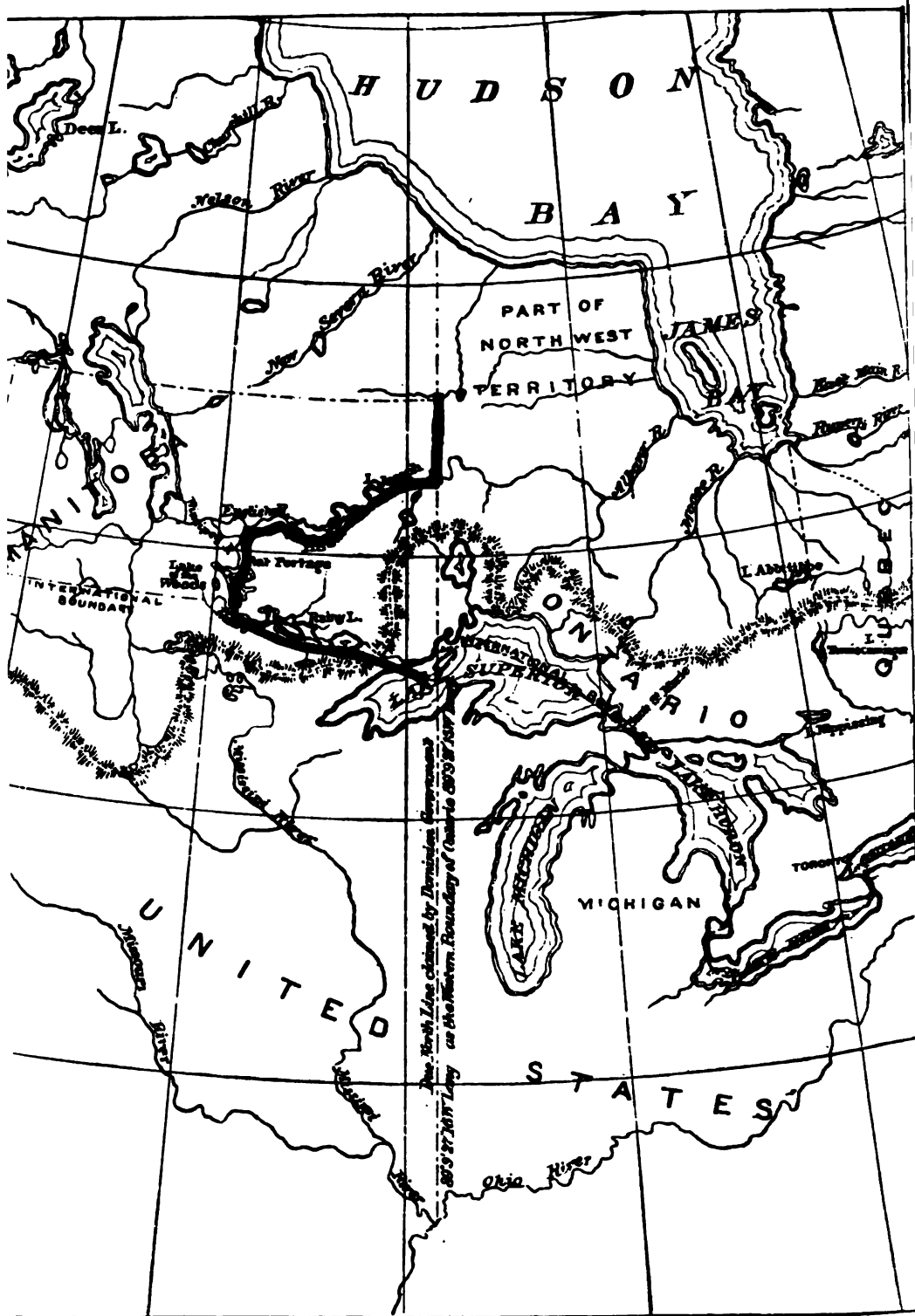
"Maintient la dite exception à la forme des intimés et renvoie la dite requête en nullité de décret avec dépens distraits à Maitres Robertson, Ritchie & Fleet, avocats des intimés, sauf au requérant à se pourvoir de nouveau."

Exception à la forme maintained.

Calder for Petitioner.

Robertson, Ritchie & Fleet for Respondents.





The Legal News.

VOL. VII. OCTOBER 4, 1884. No. 40.

THE BOUNDARY QUESTION.

We have now before us the text of the report of the Judicial Committee on the boundary question. It may have the advantage of setting at rest a troublesome dispute, but there its merit ends. Both in matter and in form it is disappointing. It would have been satisfactory, for those who have taken an interest in the question, to know the grounds of the decision, and the respect and confidence with which their Lordships' opinion would have been received by the public generally, would not have been diminished had they condescended to explain what part of the voluminous evidence had led them to the extraordinary conclusion at which they have arrived. Their lordships must be dwelling in the murkiest mists of officialdom if they fancy that, in this skeptical age, an unreasoning opinion will be received as gospel, even in a colony. It is not safe to presume too far on the assumption of colonial dullness, and our bump of veneration is not so developed as to induce us to accept, with implicit faith, the edicts of oracular wisdom.

The judicial committee has made answer, such as it is, to the three questions put. First, they hold that the award was not binding. As an abstract proposition there was really no doubt on this point. It will, however, be remembered that Mr. Mowat thought it of so much importance that in the Lieutenant-Governor's speech, it was specially alluded to as a triumph of the Attorney General's diplomacy, that the validity of the award was to be treated as a preliminary question. The learned gentleman has lost the saddle but not the horse, for their Lordships hurry on to say that, nevertheless, the boundary lines laid down by the award, so far as they relate to the territory in dispute between Ontario and Manitoba, are "substantially correct."

Perhaps it may be a subject of regret, that the judicial committee, being of the opinion that the award was "substantially correct"

so far, did not confine themselves to confirming what they could not amend. The terms of the award are, at all events, coherent, those of the judicial opinion are not.

It is not the object of this paper to discuss the verbal inaccuracies of their Lordships' composition. We need not stop to enquire how the true boundary between the *Western* part of the Province of Ontario, and the *South-Eastern* part of the Province of Manitoba can ever be described, nor is it necessary to take up the point raised so effectually by Mr. W. Mc. D. Dawson. As plain as words can put it, the report says, after describing another line as the "true boundary," that a line drawn due north from the confluence of the rivers Mississippi and Ohio "forms the boundary eastward of the Province of Manitoba." What is amusing in the matter is that this palpable blunder of redaction makes the judicial committee say precisely what the act of 1774 enacted in terms too clear for equivocation. But the Act of 1774 dealt with what was then British territory, whereas their Lordships have coolly annexed a part of the United States.

The object of this paper is to point out the strength of the old argument, now that we have a proposition, defined in a manner, to combat. We shall, therefore, presume that their Lordships intended to answer the question secondly submitted to them, that is what was, on the evidence, the true boundary *between* the Provinces; that is, that they did not intend to go further than to describe, as the dividing line, any line that had not Ontario on one side and Manitoba on the other, and that the allusion to the international line and to the due north line was only incidental, or to exclude the presumption that Manitoba extended to the south of Ontario, or that Ontario extended north of the Albany River. This will reduce the report to that part of the line beginning at the Lake of the Woods, and going "to the most north-western point of that lake as runs northward," &c., to where it strikes the due north line from the confluence of the Mississippi and Ohio Rivers.

In this way we shall cut off the somewhat alarming *tracé* their Lordships have indulged in of the international boundary between

Canada and the United States, and the remarkable admission that the due north line is the eastern boundary of Manitoba, and escape lengthy discussion as to matters not essential.

In order that our descriptive powers may not turn out to be as feeble as those of their Lordships, a map has been prepared to show what it is presumed they meant to hold. By looking at that map and following the red line, it will be seen that the line bounds Ontario on the south from the west of Lake Superior to the Lake of the Woods, by the international line, then by the Lake of the Woods and the flow of waters into that lake up to the head waters of Lake Seul, then from the head of Lake Seul to the head of Lake St. Joseph, till it reaches the due north line from the confluence of the Mississippi and Ohio Rivers, and then, so far as Ontario is concerned, it ends. Their Lordships then evidently intend to say that the due north line there struck forms the eastern boundary of Manitoba, so far as that Province goes to the north.

In a most inartistic way, then, they have answered the second question affirmatively and negatively. Affirmatively in this, that Ontario and Manitoba are co-terminous from the Lake of the Woods to the point described in Lake St. Joseph; and negatively, that Manitoba does not touch the international line east of the Lake of the Woods, and that Ontario does not go north of the Albany River.

There is still one thing to note, which may perhaps be explained, but which the writer is unable satisfactorily to account for. Why did the judicial committee refer to the confluence of the Mississippi and Ohio due north line at all? In no statute is it given as the limits of Manitoba. Is it a coincidence? In the map accompanying the Ontario award papers, Manitoba is brought up to that line. Is there any authority for this; or did their Lordships inhale this with the rest of Mr. Mowat's deftly put propositions?

Let us pass to the real argument. We may now say two propositions constituted the boundary dispute. The one, the due north line from the confluence of the Ohio and Mississippi. The other, that marked in

red on the accompanying map. There is no longer any question of Mr. Mowat's vague contention of eleven years ago, or of his alternative proposition before the Privy Council. He formally gives up "the point further west," and admits that Ontario has her full share of territory, now that she is only limited to the westward by the system of waters which may be generally described as beginning at the Lake of the Woods, and ending at the mouth of the Albany River.

But how can the red line be defended? It is perfectly clear that by no system of interpretation can it be evolved from the Act of 1774. The only way of making a show of supporting it on the statute was by talking vaguely of a point further west, which might mean the Rocky Mountains or the mouth of the Columbia river. Therefore it is we heard all these semi-intelligent, scattering suggestions, which numerically strong bodies substitute for argument, in ages of unreason.

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sent to be muzzled like the minority of the House of Commons. Let us hope, if he is permitted to experimentalize much longer in altering the British constitution, he may be more successful in transfiguring the House of Lords, than he has been in remodeling the Privy Council. R.

CRITICISM OF MAGISTRATES.

Magistrates in England do not appear to be especially sensitive to criticism upon their decisions; at least one would so infer from the fact that remarks like the following (from *London Truth*, Aug. 14, 1884) passed without notice:—

"At the Westminster Police Court, last week, David Butler was charged with assaulting Margaret Dibben, also with assaulting Mr. Edward Halsey, who interfered to protect her, and with biting a policeman's thumb. The prisoner knocked the woman down without the slightest provocation, and was proceeding to kick her, when he was prevented by Mr. Halsey. A policeman then came up and was bitten while taking the prisoner to the station. One would naturally have expected that Butler would have been sentenced to a few months' hard labour, but Mr. D'Eyncourt, with a leniency *alike scandalous and inexplicable*, fined him five shillings and costs for each assault. It is certainly not surprising that decent women are afraid to cross some parts of London alone, if this is the way in which magistrates treat their assailants."

We remember that some time ago, when the Recorder of Montreal was censured in some of the daily papers for undue severity to a young woman charging with loitering on the street, he did not exhibit the same indifference.

PROFESSIONAL PRIVILEGE.

We have an interesting budget of cases this week on the question of professional privilege. In *Ex parte Kavanagh* it was held by Mr. Justice Cross that a lawyer cannot refuse to testify that his client in a previous *capias* case signed and swore to a particular affidavit, even though the lawyer be retained for the same person in a charge of perjury based on such affidavit. In *Ex parte*

Abbott, Mr. Justice Jetté ruled that the Managing Director of a company cannot be forced to produce correspondence between him and the solicitor of the company relating to the suit in which he is examined. In connection with these cases we copy an article on Professional Privilege from the *St. James' Budget*, referring to the case of Cox and Railton, in which it appears to have been held that professional privilege is not to be extended so as to shield a person who has been engaged in criminal acts.

DISTURBANCE OF COURTS BY EXTERNAL NOISES.

At Swansea Assizes recently, Mr. Justice Stephen had occasion to complain of the annoyance caused in Court by the continued hammering on board a ship in the neighbouring dock basin. Having sent once or twice to request that the noise might be discontinued, the learned Judge despatched the High Sheriff to the scene of the annoyance, and he presently returned with the offending workmen. His lordship, after lecturing the men, told them that they must desist, adding, that if it caused them inconvenience to stop hammering, they must let him know. *London Truth* remarks: "It must naturally cause workmen inconvenience, and probably loss, to knock off work for an indefinite period in the middle of the day; and I fail to see by what right any judge can order them to do so. If the Swansea Courts are unsuited for their purpose, by all means let steps be taken to improve them; but not in this way." Mr. Justice Stephen met with a measure of success; a learned correspondent reminds us that the late Mr. Justice C. Mondelet was not as fortunate, when he sent to the Regimental Band to stop playing upon the Champ de Mars in Montreal. It refused.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, August 8, 1884.

[In Chambers.]

Before Cross, J.

Ex parte HENRY KAVANAGH, Petitioner for writ of Habeas Corpus.

Privilege of Counsel—Confidential Communication.

*On a charge of perjury alleged to have been committed in an affidavit made by the defendant in order to obtain a writ of *capias*, the counsel for the accused, plaintiff in the *capias* suit, was asked to prove the identity of the accused as the person who signed and swore to the affidavit. Held, that this was not a private or confidential matter, and further that the fact that the witness was also retained for the accused in the perjury case did not excuse him from answering.*

CROSS, J. A writ of Habeas Corpus has been issued on the petition of a member of the Montreal Bar, committed for contempt by the Police Magistrate for refusing to answer a question put to him as a witness for the prosecution at the preliminary investigation of a complaint made by one Lewis, a defendant in a previous civil suit, against Gerhardt, a plaintiff in the same civil suit, wherein said Lewis charged the said Gerhardt with perjury, in having sworn to the statements contained in an affidavit produced in that suit to obtain a writ of *capias*.

The petitioner was employed as Attorney and Counsel for the Plaintiff in the civil suit and had drawn the affidavit used for the purpose of taking out the *capias*. He was also acting for the defence of his client on the accusation of perjury brought against him.

As witness on the investigation he was asked who made and signed the affidavit; this he refused to answer on the ground that he would be thereby disclosing a confidential communication made to him as Counsel.

The magistrate held that he was bound to answer, and on his persistent refusal committed him for contempt, from which commitment he now seeks relief, on the ground that any information on the subject derived from his client was in the nature of a privileged communication which he was protected from disclosing.

I take it from the general tenor of the Books of authority on the subject, it will be conceded that the privilege is limited to matters which the witness learned only as Counsel; that is when consulted professionally as Counsel or Attorney, and referring to such a work as Greenleaf on Evidence, § 243, it will be seen that it relates only to private and otherwise confidential communications. The

affidavit made and filed with the Clerk of the Court, and the identity of the person who swore to it, involved no matter of a private or confidential nature. They were intended to be made public, and were in effect published by the deposit of the affidavit in Court. In my opinion an affirmative answer to the question put to the witness would not involve the disclosure of a confidential communication.

Mr. Kavanagh must be considered as having had two retainers. The first in the *capias* suit, the making and filing of the Affidavit for which involved no criminality, and up to the time of its statements being impugned by the accusation of perjury there was nothing to prevent him from being examined as a witness regarding these facts (including the identity of the person who made the Affidavit) on any pertinent proceeding where the proof of them might have been required. The lodging of the complaint of perjury made no difference in this respect, it neither made a communication confidential, which, prior to that event, had no such aspect, nor could it excuse Kavanagh from answering what he would have been bound to disclose had no such accusation been made. His second retainer to defend his client from the criminal charge did not place him in a different position as regards the previous facts, although the identity of the person who made the affidavit then became a link in evidence necessary to a conviction. This fact had not been of a private or confidential nature, and the making of the criminal charge could not convert it into what it was not originally.

It might have been otherwise if he had sworn that his only knowledge of the making of the affidavit, and the identity of the person who made it, was obtained by him through confidential communications made to him by his client on his second retainer for the defence on the perjury charge. This he had not done, and it was improbable from the circumstances that he could do it, but if such were the fact, and he were still willing to declare it on oath, I think he would be entitled to the protection he seeks. As, however, the record now stands, I think he has not made out a case of privilege and I must order his remand. A case of sufficient declaration on oath to

entitle a party to be excused from further answering will be found in the House of Lords' Appeal Cases, Part 1st. of Reports, in March, 1884. It is the case of *Lyell v. Kennedy*, and cases illustrative of the extent to which the privilege is carried will be found cited in the 3rd volume of "Russell on Crimes," by Prentice, at p. 549.

I order the remand of the Petitioner.

J. N. Greenshields and *E. Guerin* for the Petitioner.

M. Hutchinson for the private prosecution.

SUPERIOR COURT.

MONTREAL, Sept. 30, 1884.

[In Chambers.]

Before JETTE, J.

Ex parte ABBOTT, Petitioner.

Privileged Communication — Attorney and Solicitor.

Communications between solicitor and client are privileged, and accordingly it was held that the managing director of a company could not be forced to produce letters written to him by the solicitor of the company touching the suit in which said company was defendant.

Mr. H. Abbott, Jr., was named commissioner to take evidence in the city of Montreal, in a suit pending before the Court of Queen's Bench, at Winnipeg, in Manitoba, wherein the Imperial Bank of Canada is plaintiff, and the Guarantee Company of North America is defendant.

Mr. Edward Rawlings, managing director of the company defendant, being asked to produce letters referring to the suit, received by him from Mr. J. S. Ewart, solicitor of the company in Winnipeg, objected on the ground that communications between solicitor and client are privileged.

The Commissioner reserved the objection, and ordered the witness to answer.

The witness persisting in his refusal, the Commissioner petitioned the Superior Court for an order that the witness produce the correspondence.

J. C. Hatton, for the defendant, cited *Hamelyn v. White*, 6 P. R. (Ont.) 143: "Communications between solicitor and client are privileged no matter at what time made, so long as they are professional and made in a professional

character." Also *Wilson v. Brunsell*, 2 Chancery Chamber Reports, (Ont.) 137: "In a case between vendor and purchaser, where a defendant who was called on to produce a certain letter which he refused to produce on the grounds 'that the same is and contains an opinion from the said Magrath, who was then acting as my counsel and solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premises, and because the same is a communication between myself and my solicitor, relative to my said title,' it was held to be a privileged communication."

R. C. Smith, contra.

PRES. CURIAM. The petitioner was appointed commissioner to take evidence in this city in a suit of the Imperial Bank of Canada against the Guarantee Company of North America which is pending in the Court of Queen's Bench in Manitoba. The managing director of the defendants was called as a witness before the commissioner, and was asked by the plaintiff's counsel to produce letters received by him from the company's solicitor in Winnipeg relating to the suit in which the evidence was being taken. The defendant's counsel objected to the production of the letters on the ground that communications between client and solicitor are privileged. The commissioner reserved the objection for the decision of the court in Manitoba, and ordered the witness to produce the letters. The witness still refusing, the commissioner petitions this court for an order to the witness to produce the papers. The court is of opinion, upon the authorities cited, that the witness is not bound to produce the letters. The petitioner will therefore take nothing by his petition.

Maclaren, Leet & Smith for Imperial Bank.

J. C. Hatton for Guarantee Co. of North America.

COUR DE CIRCUIT.

MONTREAL, Mai 1884.

Coram MOUSSEAU, J.

LAURIN V. LA CORPORATION DE LA FABRIQUE DU SAULT-AU-RECOLLET.

Procédure—Exception à la forme—Art. 793, Code municipal.

Jurk: Que l'avis de huit jours et le dépôt de dix piastres, exigés par la section 28 du chapitre 36 de la 45 Victoria, pour l'émanation de l'action accordée par l'article 793 du Code municipal, ne sont pas requis dans les actions civiles intentées contre les corporations municipales à raison du mauvais entretien de leur chemin.

Qu'une exception à la forme basée sur le défaut d'avis et de dépôt devait être renvoyée.

Mercier, Beausoleil & Martineau pour le demandeur.

Préfontaine & Lafontaine pour la défenderesse.

PROFESSIONAL PRIVILEGE.

No other tribunal is so impressive to look at as the full court for Crown Cases Reserved; and it decided last week a question of an importance commensurate with its dignity. The ten judges, being all agreed as to their conclusion, gave judgment at the close of the arguments; but reserved their reasons for enunciation upon some future occasion. It is, however, apparent from the course of the proceedings what were the substantial grounds of their decision; and there is therefore no impropriety in stating briefly the nature of the case.

Two men named Cox and Railton were convicted three months ago, before the Recorder of London, of a conspiracy to defraud a gentleman named Munster of the fruits of a judgment which he had obtained against them. The action in which this judgment was obtained was for libel; and the defendants had consented to a judgment against them for forty shillings and costs "as between solicitor and client." The successful plaintiff, having taxed his costs, issued execution against Railton, and was about to seize his goods. Railton and Cox were partners, and they consulted a solicitor as to whether, if Railton gave Cox a bill of sale over goods belonging to the firm, that would save them from being taken in execution. The solicitor replied that, as the partnership would be in existence at the time of making the bill of sale, this device would be ineffectual; and the two men thereupon paid his fee and went away. Railton then executed a bill of sale, falsely dated at a

time before the partnership was entered into, purporting to convey the property in the goods to Cox; and the deed of partnership between the two men was endorsed with a memorandum, also antedated and not consistent with the conditions of the deed itself, declaring that the partnership was dissolved at a time prior to the execution of the bill of sale. When the evidence of the solicitor was tendered at the trial, it was objected to, on the ground that everything which passes between a solicitor and his client is privileged and cannot be given in evidence until it is independently shown to be probable that the latter was committing or meditating some kind of fraud. The Recorder admitted the evidence, and upon the conviction of the defendants reserved a case for the consideration of the court; which, after hearing it argued twice—the second time before no fewer than ten judges, who would have been eleven but for the illness of the Lord Chief Justice—unanimously held that the evidence was properly received, and affirmed the conviction.

The difficulty in the case was to draw a line between two contending or, so to speak, conterminous principles. On the one hand, the general rule that solicitors are not to reveal communications made to them by their clients in professional confidence is manifestly necessary, in order that people may be able to instruct their solicitors upon any subject at all with the unreserve which is essential to success. On the other hand, it is clear that such privilege ought to afford the least possible protection to crime—either where the solicitor is an accomplice, putting his special knowledge at the service of his principals, or where, as in this case, there is no suggestion of any impropriety in his conduct. The merits of the case were not in any doubt. The "privilege" which protects statements made to solicitors is a privilege in fact as well as in name; and as such it clearly ought not to be extended to shield a person who has sought to abuse it by making it facilitate the commission of a crime. That Mr. Clarke, Q.C., who conducted the case on behalf of the convicted men felt obliged to admit this, appeared from his basing his argument upon the proposition that the

judges could not decide the case in the light of the evidence whose admissibility was disputed, but must decide as if they did not know what the effect of that evidence was. He insisted that, as the case was stated by the Recorder, nothing appeared except that the witness was a solicitor, and had been professionally consulted by the defendants before the commission of their crime. This being so, he urged, no questions ought to have been asked as to the nature of their communication, until the prosecution had established a reasonable suspicion, on independent grounds, of fraud on the part of the accused; which he submitted that the case stated did not show to have been the fact. Whether or not his main proposition is good law, it seems plausible enough to the lay mind; and it may pretty safely be assumed that, when the detailed judgments of the Court come to be given, it will appear that they do not concur in his assertion that in this case no such grounds of suspicion had been shown as he declared to be necessary to rebut the presumption of privilege. The judgments will be awaited with great interest, as they will form the leading authority upon a subject of the first importance; and it is to be hoped that they will, as far as possible, establish the principles which regulate the privilege allowed to communications made by accused persons to their solicitors upon a permanent and intelligible footing.—*St. James Budget*, 5th July, 1884.

FRANCE AND CHINA.

The recent relations of France and China are without exact parallel since the existence of international law was first recognized. Naval battles have been fought before now, and forts bombarded, without declaration of war. England herself has created more than one precedent for that. Reprisals as bold, though perhaps more susceptible of justification than the seizure of Keelung, have been carried out again and again by many nations. But we know of no instance where elaborate hostile operations have been carried on between two sovereign powers, neither of whom admits that a state of formal war exists between them. The contention put forward on behalf

of the French government, that its late operations on the river Min are compatible with a "state of reprisals" and nothing more, is still more anomalous. Reprisals, as hitherto understood, may have included the "seizure of pledges," and possibly even the *quasi* hostile occupation of territory. But the term has never yet been allowed in international law to cover regular battles, involving immense slaughter, and terminating in the destruction of an arsenal, a fleet, and numerous forts. As well might it be called a reprisal if a French army had besieged and captured Peking, and dictated its own terms in the Chinese capital. When the English government bombarded Alexandria, and subsequently prosecuted a formal campaign, ending in a pitched battle, it was regarded in many quarters as rather a bold euphemism to describe the operations as "a measure of police," and deny them the character of formal war. But technically the distinction was justified by the fact that the English operations were authorized by the lawful ruler of the country, against whom the enemy was in more or less formal rebellion. In China, on the other hand, two sovereign powers have been in collision. It, of course, rests primarily with the parties themselves whether or not their relations are to be considered those of belligerents. Either is at liberty, when it suits his convenience, to substitute a state of formal for one of irregular hostility, by a formal declaration of war. At present both France and China have evident reasons for deferring that step. In the event, however, of a repetition of such proceedings as those on the Min, it is far from improbable that delicate questions affecting the rights of third parties will be raised, which will require the relations of the two principals to be decided by the rules of international law and those only. Moreover, it may be added that, though they are in a minority, many eminent authorities have doubted the justifiability of hostile acts unprecedented by declaration of war. Grotius himself appears to adopt the opinion of a great Roman jurist that "enemies are those who have publicly declared war on us, or we on them—the rest are thieves or robbers." The most eminent French authority, De Vattel, is on the same side. If there is any foundation for a recent statement that the Chinese government has set a price upon the heads of Frenchmen, the Chinese would seem to be of a similar opinion. In denying to China the right to formalities, which whether necessary or not, have been commonly observed between civilized powers, much has undoubtedly been done to impart undue ferocity to the strife. On every ground, therefore, a continuance of the present irregular relations of the two governments is to be deprecated.—*Law Times*.

The Legal News.

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STATUS OF CANADIAN QUEEN'S COUNSEL.

The position to which Colonial Queen's Counsel are entitled, when associated with English Queen's Counsel before the Judicial Committee of the Privy Council, has been open to some question. Mr. Mowat, the Attorney General for Ontario, having offered the junior brief in the Boundary Case to Mr. Scoble, Q. C., the latter was in some doubt whether his acceptance would be considered a breach of etiquette. The matter being referred to Sir Henry James, Attorney General, the following opinion was expressed:—

"It appears to me that the Privy Council is common ground to the bars of this country and all our colonies and dependencies. I see no reason why we should not accord equal rank to Her Majesty's Counsel in the Colonies when pleading in Colonial causes. As the Canadian Queen's Counsel is the Attorney-General of Ontario, I think there is an additional reason why, in this particular case, you should not object to allow him to act as your leader."

HOMICIDE BY NECESSITY.

The case of the starving sailors on the yacht *Mignonette*, who killed and ate one of their number, has attracted attention to the law applicable to homicide under certain extraordinary circumstances. The *Law Journal* says:—"Hunger is no defence to a charge of larceny, still less is it a defence to a charge of murder. There is authority in the books for saying that if two drowning men grasp a plank which will only support one, it is not homicide for one to push the other off. This is looked upon as a sort of act of self-defence, and is as far as the law goes in admitting the plea of necessity." The case cited certainly goes pretty far. That of two shipwrecked sailors who are reduced to their last loaf of bread, and one pushes the other off the boat or raft in order that he may keep

the whole loaf to himself, would not differ very greatly. The killing of a comrade, in order that the others may prolong their existence by eating his body, is going a step further, but the act seems to exceed those mentioned above more in its repulsiveness than in actual guilt. In all these cases, it may be remarked, the homicide is committed for a mere chance of rescue, and not for a certainty.

LIMITATION OF APPEALS.

Lord Bramwell, in a letter to the *Times*, adopts the contrary view to that so well stated by W. B., in the letter quoted *ante*, p. 289. As this is a subject of general interest, and the controversy is in such able hands, we reproduce his lordship's letter in full:—

"Sir,—No one can speak with greater authority than 'W. B.' on the subjects on which he has addressed you. But on one of them I venture to differ—viz. the desirability of limiting the number of appeals. I gave my reasons in the Lords in support of the Chancellor's bill. Your reporter did not report them. This is an appeal from him to you.

"My objection is not that difficult questions do not arise when the dispute is for a small amount. They do as much as when it is for a large one. Nor do I say that such appeals are vexatious, except in so far as the amount is so small as to make them so. My objection is that such appeals 'do not pay,' that prudent litigants should agree to do without them, and that as litigants will not be wise for themselves the State should be for them. Suppose one man honestly believes that another owes him 20*l.*, and suppose the other as honestly believes he does not. What is to be done? They will not toss up to settle, for each would feel that that would be giving up the advantage of being in the right. They must get it settled for them by a Court of law or an arbitrator. Would they not show good sense and good temper by agreeing that the first should be the final decision? This must be arranged before any decision is pronounced. For the one against whom it is pronounced, if he gave up his right to appeal, would do so without any return, besides which costs would have been incurred, in-

creasing the temptation to appeal. It may be said that litigants can so agree now. That is true, but they do not. Litigants are in a state of quarrel, and do not agree. Each is satisfied that what the one proposes is for the disadvantage of the other. The result is that the law should do them this kindness.

"A word or two on the history of the matter. By the law thirty-five years ago appeals at common law—that is, the law that dealt mainly with commercial cases and wrongs, were limited to writs of error for errors apparent on the record, new trials, for mistake of judge or jury—the appeal being only to the Court where the case was—and appeals from the judge at chambers to his Court. By the Common Law Procedure Act, appeals to a Court of Appeal were authorized in special cases, and from the granting and refusing of new trials on matters of law. This was quite right. The Court of Appeal was the Exchequer Chamber. Its sittings were less than eight weeks in a year. As one Division of the Court of Appeal now gives the whole of its time to Common law appeals, it will be seen how they must have increased. That arose in this way. When the Judicature Acts passed it became necessary to make rules applicable to the common law cases and also to the equity cases. In equity everything had been appealable, with some reason or justification, because the dispute was generally for a large amount. Equity had none of the trumpery cases which went to the Common Law Courts. There was a committee of judges to frame the rules, of whom the late Master of the Rolls was the head. He brought his equity practice to bear on the matter, and being, I will only say, a very strong man, had his way, and so appeals were allowed in common law cases contrary to the old practice, and where the amount in dispute did not justify them. A right of appeal does not exist in the nature of things. It is not a natural right. I am by no means sure that it would not be better to have no appeal at all. But supposing that one appeal should be allowed, it cannot be said that it must be right to have two or three. Now, the Chancellor's bill did not refuse a first appeal, even in small matters.

"I cannot but think that the judges were

right in recommending a limitation of the power of appeal in such small matters. It would be a mercy to the suitors, and remove a scandal from the law. This, I believe, from an article that appeared in the *Times* three or four days ago, is also your opinion."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, September 24, 1884.

Before DORION, C.J., MONK, RAMSAY, CROSS, and BABY, JJ.

THE QUEEN v. JOHN SCOTT.

32-33 Vic. c. 20, s. 25—*Refusal of Husband to provide necessary food for wife — Indictment—Evidence.*

In an indictment under 32-33 Vic. c. 20, s. 25, it is not necessary to allege that by the refusal and neglect of the defendant to supply the necessary food, etc., to his wife, her life had been endangered or her health permanently injured; nor is it necessary to make proof to that effect.

The following case had been reserved by the Chief Justice:—

The defendant John Scott was tried before me on the 10th of June instant (1884), on a charge under the 32 & 33 Vic. ch. 20, sec. 25, of having refused and neglected to provide necessary food, clothing and lodging for his wife, Elizabeth McDougall, on an indictment in the following terms:—"That John Scott, on the 19th day of April, in the year of our Lord 1883, at the city of Montreal, in the district of Montreal, then being the husband of Elizabeth McDougall, and then being legally liable as her husband to provide for the said Elizabeth McDougall, his wife, necessary food, clothing and lodging, unlawfully, willfully and without lawful excuse, did refuse and neglect to provide the same."

After the case for the prosecution had been closed, the counsel for the defendant submitted to the court that there was no case to go to the jury, inasmuch as it was not alleged in the indictment, and it had not been proved, that by the neglect of the defendant to provide food, etc., for his wife, the said Elizabeth McDougall, her life had been endangered or her health was likely to be permanently injured.

I ruled that putting the life in danger or causing a permanent injury to health as mentioned in sec. 25 of the above cited Act, merely applied to the offence contemplated in the second part of the section, namely that of causing or doing some bodily harm to an apprentice or servant, and not to the offence mentioned in the first part of the section, that of a husband neglecting to provide the necessary food for his wife.

The defendant thereupon entered upon his defence, and the jury returned a verdict of guilty.

At the request of the defendant I have reserved the case for the opinion of the Court of Queen's Bench on the following questions:—

1st. Was it necessary to allege in the indictment that by the refusal and neglect of the defendant to supply the necessary food, etc., to his wife, her life had been endangered or her health permanently injured?

2nd. Was it necessary to prove that the life of the defendant's wife had been endangered or her health permanently injured by his neglect to provide her with necessary food, etc., in the absence of any allegations to that effect in the indictment?

In the event of an affirmative answer to either of the above questions the verdict of guilty should be set aside, otherwise it should stand.

The defendant was admitted to bail, to appear at the next term of the Court of Queen's Bench holding criminal jurisdiction, and no sentence was pronounced.

(Signed), A. A. DORION.

Montreal, 17th June, 1884.

RAMBAY, J. [After reading the Reserved Case.] The effect of this decision is to overrule the case of the *Queen v. Maher*, reported 7 Leg. News, p. 83.

I trust it will not be considered that I am actuated by any personal feeling, in saying it is not desirable that rulings on statutes, at all events those which carry out the evident intention of the legislature, should be overturned, except for some very cogent reason. Here the principal reason appears to be that the late Chief Justice Harrison had somewhere said that he could not understand how the statute could be interpreted as I did in

the case of *Maher*. This sort of rhetorical emphasis may mark the strength of the speaker's conviction, but it is not argument. I shall endeavour in my turn to show why I adhere to my ruling in the case of *Maher*, and I shall endeavour to leave the strength of my conviction to be deduced from the force of my reasons.

The proposition of the reserved case is that the "putting of the life in danger or causing a permanent injury to health" as mentioned in Section 25, 32 and 33 Vic. c. 20, merely applies to the offence contemplated in the second part of the section.

There is no such general rule of interpretation; in fact, the general rule is rather the other way. 1. The rule is that when the controlling words are in the same section, and particularly in the same sentence, as in this case, they are applicable to the whole sentence, unless there be some substantial reason for restraining them to a part. 2. In this case they are more applicable to the first part than to the second, for the offence of omission is, by its nature, less aggravated than a similar offence of commission. Thus it is palpably more serious to make an unlawful assault on an apprentice or servant than to neglect to provide him with his dinner. 3. All the analogous enactments of the statutes have controlling words of the nature of those of the section in question. I might particularize the section next that under consideration. 4. In all indictments under the common law for similar offences, the allegation that the privation did injury is essential, as Mr. Justice Taschereau has shown in his work on criminal law, vol. 1, p. 259, on the authority of the *Queen v. Rugg*, 12 Cox, 16. See also the *Queen v. Rylands*, 10 Cox, by which this view is also supported.

It is hardly necessary to enter on the question of the general reason for rejecting the ruling of the learned Chief Justice, for it is hardly pretended that the law ought to be as he has laid it down. Under such a law, a workman neglects to provide bread for the family dinner, nobody is much the worse, still he is liable to indictment, and he ought to be convicted, unless the jury is discharged in conscience from respecting the ruling of this court, owing to its untenable character.

The interpretation, therefore, given to the law avowedly makes the statute as dangerous, and as liable to abuse as possible. Our statute was borrowed from an English act, and so soon as it appeared, the next edition of Archbold gave a form of indictment, in which the words now declared to be inapplicable were inserted for the first part of the section, as well as for the second part. I have gone through the volumes of Cox, from the 24 and 25 Vic. to the 38 and 39 Vic., when a new act was passed, and I have not found a single case in which the question now before the court was raised. I think then that this shows pretty clearly that the Archbold form has been followed. The only case that I have seen that refers at all to the section in the English act is the case already mentioned of the *Queen v. Ryland*, and in reality it was examined on a different question, the indictment which contained an allegation of actual injury was maintained as sufficient at common law.

But now a new proposition is put forth, which differs materially from that of the reserved case. It is said that our Act is not the same as the English Act, that the latter only applies to apprentices and servants, and that the controlling words in our statute only refer back to "such apprentice or servant."

It is one thing to say that controlling words in a sentence can only apply to the last part of the sentence, it is quite another to say that words referring back to an enumeration do not include the whole class but only the members of it specially mentioned in the reference. It appears to me that this proposition is even less tenable, if that be possible, than that of the reserved case. In the first place it is not true as a matter of grammatical construction. Whether in a letter, or in a contract, or in a statute, "such member" being one of an enumeration implies the whole class, unless the reason of the thing destroys the implication. To restrain the application of the words would in this case produce a curious result. Neglecting to provide a servant or an apprentice with food would not be within the Act, unless there was permanent injury or danger to life; while the mere neglect to provide food for a wife would be.

I have heard it murmured, faintly murmured, that the obligation to provide a wife with necessary food was an act of a more heinous kind than the same neglect towards an apprentice or a servant. But why should "otherwise" be so much more cared for than the apprentice? So this suggestion is put forth in despair. But in truth the wife's right to be provided with necessary food by her husband is a much more delicate question than that of the servant or apprentice, which is simply a matter of contract.

To return to the proposition of the reserved case, the Act of 1875 (38 & 39 Vic., c. 86, sect. 6) demonstrates that it never was the intention of the Parliament in England to make the unlawful neglect to provide food for an apprentice or servant a greater offence than unlawfully beating him. In the last named Act there is special provision for this offence of failing to provide food for an apprentice or servant, and immediately following, come precisely the controlling words the judgment about to be rendered seeks to excise from our statute.

It is only necessary to make one further observation on the statute, and it is this, that the curtailed reference back, which has complicated the consideration of this case, was probably due to the manner in which our statute was made. We borrowed it from the English Act as originally drawn by Mr. Greaves for the House of Lords. He substituted the controlling words for the old form of an assault, and he included, as our statute does, the husband, committee, nurse, and so on. The Lords passed the Bill as drawn, the Commons, leaving the controlling words as a substitute for the fiction of an assault, restrained it to apprentices or servants, and very properly so. As I have already observed, the obligation of the husband to provide necessities for his wife involves very intricate questions of civil law, and all the other cases were amply provided for at common law. Mr. Greaves did not relish the slaughter of his bantling, and he has recorded his regret in his edition of the Criminal Acts, 24 & 25 Vic. His view, however, has only prevailed with our Commissioners in 1869. They were taken with the surface argument, which is almost always wrong. They completed the

muddle by copying slavishly the rest of Mr. Greaves' work, and so laid a snare for this Court and for Mr. Scott.

Much ingenuity has been used and often misapplied, to restrain the operation of criminal statutes by interpretation; but the efforts to enlarge them to gratify evil passions have always been regarded as the worst kind of tyranny—tyranny under colour of law. I must say I see nothing less objectionable in extending them to gratify mawkish or maudlin sympathies.

Holding these opinions so strongly as I do, and being convinced that the statute in so many words only makes it an offence to neglect to provide when producing the kind of injury specified, it is proper I should say, for the information of those promoting such prosecutions, that I shall follow what I understand to be the prescription of the law, and not what seems to me to be the fanciful interpretation of the majority of this court. I am to quash the indictment as insufficient, and to set aside the verdict, as being based upon evidence that establishes no crime known to the law (1).

DORION, C. J. This is no doubt an important question. The indictment is in the form followed since 1869. A number of cases have come before stipendiary magistrates and before the criminal court, and the indictments have always been in this form. In none of them do I find it alleged that the refusal to provide had occasioned permanent injury. Until the case of *Maher* it does not appear to have been held anywhere that the refusal to provide must be such as to do bodily harm. In that case the jurisprudence of the magistrates was overruled by Mr. Justice Ramsay. Then the present case came before myself, and I found the old jurisprudence one way and the decision of a judge of the Court of Queen's Bench opposed to it. Look-

(1) Since this opinion was delivered I find that the Court had before it one of these questions five years ago, in the case of *Reg. v. Smith* which had escaped my recollection, and that of every one concerned. In that case I concurred, reluctantly, in a decision similar to the one given in *Scott's* case, in so far as regards pleading, pointing out all the dangers of the statute, which have been so vividly illustrated since in practice. The case is reported 2 *Leg. News*, 223.

T. K. R.

ing at the statute I was strongly impressed that it was not necessary to insert these words in the indictment. I ruled against the prisoner. However, the jury having convicted him, I reserved the question. On full consideration I am disposed to follow the jurisprudence of the magistrates, supported by the opinion of Chief Justice Harrison, who had given the question very careful consideration. I concur in the view expressed by that judge. There can be no doubt that there are two offences in the statute. The neglect of the master to provide for the apprentice so that the health of the apprentice is likely to be injured, is one offence, and the neglect of the husband to provide necessary food for his wife is another offence. As to the supposed danger of such a law I think that juries may be trusted to see that the provision of the law does not work an injustice.

MONK, J. A similar case came before me some time ago in the criminal court. The same objection was raised, but it seemed to me so futile that I overruled it. The jury, however, notwithstanding my ruling, acquitted the prisoner, and I believe rightly. Juries are not easily deceived in these matters, and I think that no hardship is likely to result from the interpretation put upon the law by the majority of this court.

BABY, J. I entirely concur in the opinion of the Chief Justice.

Conviction affirmed.

Davidson, Q. C., for the Crown.

Saint Pierre, for the defendant.

COUR DE REVISION.

MONTREAL, 31 MARS 1879.

Coram MACKAY, PAPINEAU, JETTÉ, JJ.

KINGSTON v. CORBELL.

Juge de paix—Responsabilité—Bonne foi—Jurisdiction—Prescription—Dommages—Avis.

JUGÉ: Qu'un magistrat qui émane un warrant d'arrestation sans jurisdiction n'est pas responsable en dommages vis-à-vis la personne arrêtée en l'absence de preuve de malice et de mauvaise foi de la part du magistrat.

Qu'une action en dommages contre un magistrat pour un acte par lui fait en sa dite qualité se prescrit par six mois à compter de l'acte même.

Qu'il est nécessaire de lui donner avis de l'action.

Le demandeur par son action réclamait des dommages du défendeur parce que le 20 août 1877 sur la plainte d'un nommé Clément, le défendeur émana un *warrant* d'arrestation en vertu duquel il fut appréhendé et arrêté pour avoir "renvoyé le dit Clément de son service sans lui payer ses gages, etc." Sur procès devant le dit juge de paix, le demandeur fut condamné à payer la dette, les frais et un dollar d'amende.

Le défendeur plaida qu'il avait agi avec bonne foi et dans les limites de sa juridiction. Que le demandeur, en ne faisant pas casser le jugement par un tribunal supérieur s'il était illégal, avait acquiescé au dit jugement, et que son action était prescrite par six mois.

La Cour Supérieure, (6 novembre 1878, Rainville, J.), décidant que le défendeur, ayant agi sans juridiction, était responsable, même sans preuve de malice directe, le condamna à \$30 dommages réels et personnels avec dépens.

Voici le jugement de la Cour de Révision :
"The Court, etc.

"Considering that defendant has in the judgment complained of the advantage of a finding in his favor that he, the defendant, did not act maliciously in the matter of the warrant issued against plaintiff and the proceedings upon it ;

"Considering further that, in fact, defendant was not guilty of malice and seems to have been in good faith and to have supposed himself to have had jurisdiction, to wit : under chapter 27 of the Consolidated Statutes of Lower Canada ;

"Considering that upon such finding and proof of absence of malice, defendant ought not to have been condemned in damages ;

"Considering further that under the circumstances, this action has been brought too late, to wit, commenced long after six months after the act committed by defendant that plaintiff complains of (Consolidated Statutes of Lower Canada, cap. 101, sec. 7) ;

"Considering further that in the Court below proof was not of notice of action to defendant ;

"Considering finally that the material allegations of plaintiff's declaration were

not proved ; and that in the judgment complained of condemning the defendant there is error ;

"This Court doth reverse the said judgment of the 30th day of November, 1878, and proceeding to render the judgment that ought to have been rendered, doth dismiss plaintiff's action with costs in the Court below and in this Court against said plaintiff, of which costs *distraction* is granted to Messrs. Ouimet, Ouimet & Nantel, attorneys for defendant ; and it is ordered that the record be remitted to the Court below."

Thibault & McGowan pour le demandeur.

Ouimet, Ouimet & Nantel pour le défendeur.
(J. J. B.)

COUR DE CIRCUIT.

MONTRÉAL, septembre 1884.

Coram CARON, J.

AMORIS V. LATREILLE.

Prêt—Dette de jeu—Déni d'action—Intérêt au jeu.

JUGÉ : *Qu'un prêt d'argent fait par une personne qui a cessé de jouer, à un des joueurs qui continue peut être recouvert en loi.*

Que toute personne qui n'est pas intéressée dans le jeu est considérée comme tiers auquel l'article 1927, C. C. ne s'applique pas.

Le demandeur après une nuit passée à jouer aux cartes avec le défendeur et un tiers se retira du jeu vers les sept heures du matin. Quelques instants après le défendeur ayant perdu ce qu'il avait d'argent sur lui et étant endetté de \$25 envers le tiers, se leva de table, emprunta du demandeur, qui était resté dans le même appartement, la somme de \$50 avec laquelle il paya ce qu'il avait emprunté, il continua à jouer et perdit le reste.

L'action du demandeur fut un *assumpsit* pour argent prêté.

Le défendeur plaida par exception, et prétendit que c'était une dette de jeu qui tombait sous l'article 1927 C.C. et que, par conséquent, le demandeur n'avait pas d'action.

A l'argument le demandeur soutint que le fait que le demandeur savait que le défendeur empruntait ces \$50 pour jouer aux cartes ne changeait pas la nature du contrat intervenu entre eux, qui était celui de prêt.

La règle pour reconnaître l'application de l'article 1927 C.C. dans un cas d'argent prêté, est de savoir si le prêteur a un intérêt dans le jeu soit comme joueur actuel, soit comme associé de l'un des joueurs, soit en prélevant une part de la mise des joueurs, etc.; s'il n'a aucun intérêt, il est un tiers et a une action en recouvrement de l'argent prêté. Dans tous les cas, \$25 ont été employées pour payer une dette contractée au moment du prêt, et puisque le paiement d'une dette de jeu est reconnu légal par cet article 1927 C.C., il est permis d'emprunter pour payer, il devrait toujours réussir pour \$25. Le demandeur cita 4 *Aubry & Rau, Troplong, Contrats aléatoires*, No. 66 et suivants; et *Teulet, Codes annotés*, page 624, No. 41 et suivants.

Le défendeur, au contraire, argua que la connaissance qu'avait le demandeur de l'emploi que devait faire le défendeur de son argent, l'empêchait de recouvrer. En prêtant cet argent, le demandeur a encouragé le jeu, il y est devenu partie, l'emprunt contracté par le défendeur est devenue un contrat de jeu, pour lequel la loi dénie l'action.

La cour adoptant l'argument du demandeur dit que la question était de savoir si le prêteur avait ou non un intérêt quelconque dans le jeu, et que dans le cas actuel, il était établi que le demandeur n'en avait pas. Que d'ailleurs, le contrat de jeu n'était pas illégal en soi; la loi ne le considérant pas digne de son attention, refuse de le sanctionner par une action, mais les engagements ainsi contractés restent des dettes d'honneur. Dans l'espèce, ce n'est pas un contrat entre les joueurs, c'est un prêt d'argent fait par un tiers pour un but licite.

Jugement en faveur du demandeur pour le montant réclamé dans l'action avec dépens.

J. J. Beauchamp pour le demandeur.

Doutre, Joseph & Dandurand pour le défendeur.

(J. J. B.)

COUR DE CIRCUIT.

MONTREAL, 30 septembre 1884.

Coram PAPINEAU, J.

LA CORPORATION DU COMTÉ DE ST. JEAN V. LA CORPORATION DE LA PAROISSE DE LAPRAIRIE.

Procès ultra vires—Nullité de procès-verbal—Acte de répartition—Vente des travaux au rabais—Application de l'article 775, Code municipal.

La demanderesse réclamait \$436 qui était la proportion mise à la charge d'un certain nombre de contribuables de Laprairie dans le prix des travaux ordonnés par procès-verbal fait sous la direction du Bureau des Délégués des comtés de St-Jean et de Laprairie. Cette somme comprenait aussi les frais du procès-verbal, des avis, de l'acte de répartition et de la vente des travaux à l'entreprise. Il s'agissait d'un chemin déjà ouvert qui conduit de St-Jean à Laprairie et passe aussi dans deux comtés voisins. Le procès-verbal ordonnait le creusement des fossés, la réparation du chemin et des ponts et la construction des clôtures sur les deux côtés de la route dans toute son étendue; le procès-verbal pourvoyait en outre au mode de réparation et d'entretien du chemin et des clôtures. L'officier chargé de préparer ce procès-verbal avait inclus dans les travaux à faire sur le chemin toute la clôture des deux côtés de la ligne; enlevant ainsi, en violation de l'article 775 du Code Municipal, la part de clôtures réservée par la loi aux propriétaires voisins. Le Bureau des Délégués des deux comtés a homologué ce procès-verbal et a fait faire l'acte de répartition nécessaire entre les contribuables intéressés.

La demanderesse a donné les travaux à l'entreprise, les a fait exécuter et elle s'est ensuite adressée aux municipalités locales pour en obtenir le prix. La défenderesse a plaidé à l'action dirigée contre elle, que le procès-verbal était nul, *ultra vires*; que les officiers municipaux qui l'avaient fait et l'avaient homologué, avaient commis un excès de pouvoirs, en incluant dans les travaux à faire toute la clôture des deux côtés du chemin. Le tribunal saisi de la cause, a renvoyé la demande par un jugement, dont voici les motifs:

"Considérant que la demanderesse poursuit la défenderesse pour une portion du prix de la vente au rabais des travaux ordonnés sur un chemin traversant en partie les paroisses de Laprairie, dans le comté de ce nom, et celles de St-Luc et de Ste-Marguerite de Blairfindie, dans le comté de St-Jean, en vertu d'un procès-verbal dressé par O. N. E. Boucher et homologué le 4 de janvier 1882, par le bureau des délégués des dits comtés de St-Jean et de Laprairie;

" Considérant que le dit procès-verbal a ordonné entr'autres choses, le creusement des fossés, la réparation du chemin et de certains ponts et la reconstruction des clôtures des deux côtés du dit chemin, y compris la moitié des clôtures qui sont, par la loi, à la charge de certains propriétaires riverains du chemin en question dans la paroisse de St-Luc et dans celle de Laprairie ;

" Considérant qu'il a de plus ordonné que tous ces travaux seraient vendus pour être faits à l'entreprise et que tous les contribuables y désignés seraient appelés, y compris les propriétaires riverains 'à contribuer pour ' le tout, selon la valeur de leurs terres aux ' frais et au coût des travaux à faire,' et que cela est contraire aux dispositions du code municipal et rend nul le procès-verbal ;

" Considérant que la répartition faite par le dit O. N. E. Boucher, le 15 de juin 1882, et déposée au bureau du conseil, le trois de juillet, de la même année, en exécution du dit procès-verbal, et la vente au rabais faite des travaux du dit chemin, sont nulles aussi par suite de la nullité radicale du procès-verbal ;

" La cour déclare nuls le dit procès-verbal, la dite répartition, et la dite vente au rabais, et déboute la demanderesse de son action avec dépens en faveur de la défenderesse, distraits à Maitres DeBellefeuille & Bonin, ses avocats.

Geoffrion, Rinfret & Dorion pour la demanderesse.

DeBellefeuille & Bonin pour la défenderesse.

(J. J. B.)

COMPULSORY INSURANCE.

An interesting experiment, or series of experiments, has lately been made in Germany on the subject of compulsory insurance, by the industrial classes, against sickness and disablement. For some years there has existed in different German States legal provision for requiring workingmen to become members of benefit societies of one kind or another; and since 1876 it has been compulsory throughout the empire for those under sixteen years of age to subscribe to their communal benefit society.

A new law passed last year, and coming into operation on the 1st December next,

recognizes and widely extends the existing system, making subscription to local or trade benefit funds obligatory upon all artisans, agricultural laborers, and employes on daily wages generally, as well as the smaller class of employers. The amount to be subscribed is about two per cent. of the wages earned, against which is provided, in case of sickness, medical attendance and necessaries of all kinds, and a weekly allowance proportioned to the wages of the recipient; and in case of death a lump sum also calculated upon the deceased's wages.

The experiment will be watched with interest by all those interested in the theory and administration of the English poor laws. The new German law is identical in principle with the scheme of National Insurance propounded by the Rev. W. L. Blackley. Should it give satisfactory results, an impetus will be given to the movement in favor of legislation in the same direction in this country, and a prospect opened of reforming the poor laws off the face of the statute-book.—*Law Times.*

GENERAL NOTES.

The throwing of shrimps into the streets, especially as it may be taken for granted that shrimps so treated are not of the freshest, is an objectionable practice, says a London journal, and the Lambeth Vestry were but doing their duty in prosecuting a man who did it. It is a pity, however, that the Vestry are not better instructed in Natural History. In the charge the shrimps were described as "certain fish," and as the magistrate could not hold that shrimps are fish, the case was dismissed.

A seller of 'lucky balls' at Manchester seems to have had a lucky escape. The children who bought them were told that by the investment of twopence they had a chance of finding a half-crown, shilling, and so on down to a farthing, inside. On being opened, none of the balls appeared to contain more than a half-penny, and on this ground, apparently, the magistrate decided that there was no lottery. The balls with money inside are exactly analogous to the packets of tea with trinkets inside, decided in *Taylor v. Smith*, 52 Law J. Rep. M. C. 101, to amount to a lottery. The absence of proof that there were prizes in the balls could not weigh against the statement that there were. A lottery is none the less a lottery because it is also a fraud. The stipendiary compromised matters by making the defendant pay the cost of the summons, which was Cadi justice. However, the juvenile mind in Manchester will probably not in future be taught gambling by a system so irresistible that the blanks are sweetmeats.—*Law Journal.*

The Legal News.

VOL. VII OCTOBER 18, 1884. No. 42.

A SYSTEM OF LAW REPORTS.

The inconvenience of having several isolated and to some extent competing serials, for the publication of Law Reports in this Province, has been for some time apparent to the bar. In the Province of Ontario there is but one series of Reports, the property of the Law Society, the cost of which is paid out of the annual assessment levied on every practising barrister and attorney. Here we have not the advantage of a central organization, and the several sections of the bar have not hitherto united in any system of reports. We are glad to be able to announce that a vigorous effort is about to be made by private enterprise to remedy the great defect of our existing reports. In connection with the *Legal News* a system has been organized, the first instalment of which will be in the hands of the profession in a few days.

The Publishers of the *Legal News* propose to issue two series of volumes, one containing the decisions of the Court of Review and Superior Court, and the other the decisions of the Queen's Bench in Appeal. Each series will form a royal octavo volume of at least five hundred pages per annum, and it is believed that every case which can be usefully reported will be comprised in these volumes. It is not proposed, however, to include the judgments rendered in the District of Quebec, which are at present reported in the work published in that District.

The *Legal News* will continue to be issued in the same form as hitherto. Advance notes will appear in it of the cases reported in full in the regular series. It will also comprise as before, decisions of the Circuit Court, points of practice, and miscellaneous cases not falling within the regular system of reports. Thus the repetition of matter will be avoided.

The proposed system has the unanimous approval of the editors of the *Lower Canada*

Jurist, who for twenty-seven years past have endeavoured to supply the demand for reports. They have relinquished the *Jurist*, and it was upon notice of that fact that the present system was organized. An effort has been made to amalgamate other publications with the new project. This attempt has not been entirely successful at present, but competent aid has been secured. Mr. James Kirby continues to have the editorial charge of the entire system; Mr. E. Lafleur assumes the charge more particularly of the French reporting in the Court of Appeal, and Mr. J. J. Beauchamp of the French reporting in the Superior Court and Court of Review. These gentlemen have long been valued contributors of the *Legal News*, and in the enlarged sphere of action it is believed that their services will be still more appreciated. We think it may be said, on behalf of the publishers and editorial staff, that no effort will be spared to produce a series of reports creditable to the bar and to the Province. Under the circumstances we feel assured that the profession will give the undertaking their cordial support, and will appreciate the immense advantage of a harmonious and comprehensive system.

THE LYNAM CASE.

The decision in *Ex parte Perry* is of special interest, this being the first case of the kind that has come before our Courts. Because Mr. Justice Jetté does not pretend to omniscience some people are not pleased. But, however painful may be the idea that a person is unnecessarily deprived of his liberty, a judge cannot but realize the immense responsibility that rests upon him in a case of this nature. The daily journals abound in examples of frightful crimes committed without any motive by persons released from asylums. A case has just happened in Indiana, in which a discharged lunatic, without any conceivable motive, emptied all the chambers of his revolver into the body of a respectable citizen. The evil of a possible groundless detention is exceeded by the risks of an improper discharge. And this leads us to say that beyond the unavoidable restriction of freedom, there should be no hardships encountered in a lunatic asylum. There

should be nothing terrible or appalling about such institutions. Unfortunately, it appears from Dr. Tuke's report, recently published, that our Quebec asylums are far from coming up to the standard of well-conducted asylums in France and England; but the sufferings depicted by Dr. Tuke would not be endured by a sane person accidentally confined, for the defects pointed out apply chiefly to patients of the refractory class.

THE PUBLIC LIBRARY.

The Fraser Institute, it seems probable after all, will at no remote date have a local habitation, as well as a name on the statute book. The old High School building, in which it is to begin its existence, is central and convenient; a fair nucleus of books is available for the start, the estate is now valued at \$125,000, and there is an income of about \$3,000 per annum, with prospect of improvement. Some have been of opinion that, even on the slenderest income, a beginning should have been made long ago, in cheap, leased premises. The trustees no doubt keenly realized that such an inauguration would not be creditable to the premier city of Canada. But the unfortunate muddle in which the Fraser bequest has long been involved, without any visible token of life, has undoubtedly had the effect of deterring others from acts of benevolence in a like direction.

THE LATE MR. TERROUX.

An old and honored functionary has vanished from his wonted haunts. Mr. C. A. Terroux, J. P., who died Oct. 14, aged 75, has been for 58 years employed in the prothonotary's office at Montreal. How many births, marriages, deaths, how many family councils, partnerships, interdictions, have come within the purview of his department during this period! Mr. Terroux belonged to the old band of deserving court officials, some of whom count nearly as many years of service as the veteran now taken away. The recollection of his gentle presence and kindly word will long be cherished by his late companions, as well as by the public of whom he was the patient and courteous servant.

NOTES OF CASES.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, October 13, 1884.

Before JETTÉ, J.

Ex parte EDWARD PERRY, Requérent la libération de Rose Church, internée dans l'asile St-Jean de Dieu.

Petition for discharge of person confined as a lunatic — Conflicting medical testimony — Reference to expert.

On a petition for the discharge of a person confined as a lunatic, the Court found that the testimony of physicians who had examined the patient was conflicting, and in particular the opinion of the physician resident in the asylum was in conflict with that of the visiting physician. Held, that under the circumstances the Court would order an examination of the patient by a disinterested expert before pronouncing upon the petition for discharge.

PER CURIAM. Les tribunaux civils ont rarement à s'occuper de questions aussi importantes que celle qui est aujourd'hui pendante devant cette Cour. Depuis plus de deux ans une femme, que l'on dit saine d'esprit, est internée dans un asile d'aliénés, mise au rang des fous furieux, et l'on demande sa libération en disant que rien ne peut justifier cet internement et que cette malheureuse est victime d'une séquestration arbitraire!

On comprend, à ce simple exposé, l'intérêt que le public a paru prendre aux diverses phases de cette cause, et les sympathies qui se sont manifestées en faveur de cette pauvre femme, tant dans la presse que dans l'assistance nombreuse qui a suivi les débats de ce procès. Habitues d'ailleurs, aux bienfaits d'un régime politique qui assure et garantit toutes les libertés, les habitants de ce pays ne sauraient rester indifférents lorsqu'on affirme qu'il a été abusivement porté atteinte à la plus précieuse de ces libertés, la liberté individuelle!

Cependant si naturelles et plausibles que soient ces sympathies et cette sollicitude pour la victime présumée de cet arbitraire, je n'ai pas besoin de dire que les magistrats ne sauraient y être accessibles et qu'esclaves

de la loi ils n'ont qu'à l'appliquer sans se préoccuper des conséquences.

Cette remarque faite, j'entre de suite dans l'appréciation de la demande qui m'est maintenant soumise, et pour plus de clarté dans l'exposition des motifs de la décision que je crois devoir rendre, j'examinerai les trois points suivants :

1o. Quel est le but de la loi nouvelle dont on demande ici l'application, et quelle est la nature et l'étendue du pouvoir que cette loi confère au juge ;

2o. Quelles garanties sont nécessaires pour justifier l'application de cette loi, et accorder la libération de l'interné ;

3o. Jusqu'à quel point ces garanties se rencontrent dans l'espèce soumise.

1o. Quel est le but de la loi de 1884, et quelle est la nature et l'étendue du pouvoir qu'elle confère au juge ?

Protéger la société contre le danger que présente nécessairement la présence dans son sein d'individus dont les facultés mentales en désordre, ne suffisent plus à les retenir dans l'observation des lois et dont l'irresponsabilité devant la loi criminelle désarme l'autorité chargée de la répression des crimes et des délits, telle a été évidemment la première pensée de l'auteur de la loi de 1884.

Accorder ensuite à la liberté individuelle toutes les garanties compatibles avec la sécurité de tous, a été la seconde préoccupation du législateur.

En effet, si d'un côté la liberté individuelle doit être protégée, il est évident d'un autre côté, qu'elle ne saurait l'être au détriment de la sécurité du plus grand nombre.

Or, a dit *Parchappe*, "ce n'est qu'en portant atteinte à la liberté de l'aliéné dangereux qu'il est possible de prévenir, d'empêcher l'abus qu'il en peut faire. De là pour la société le droit et le devoir d'intervenir dans la vie de l'aliéné dangereux, et même de se saisir de sa personne pour le placer dans des conditions spéciales de surveillance et d'empêchement d'agir. L'intérêt de la sécurité publique est le premier que l'on ait songé à satisfaire."

(Legrand Du Saulle—Méd. Légale p. 667.)

Le principe fondamental de la loi reconnu, voyons maintenant dans quelles conditions

le législateur a déterminé et l'internement de l'aliéné et sa libération.

Remarquons d'abord que la loi n'ordonne l'internement que des aliénés *dangereux*. En effet, l'article 24 porte : "Lorsqu'une dénonciation est faite sous serment, devant un juge de paix, qu'une personne est aliénée et *dangereuse*..." le juge de paix peut la faire arrêter, amener devant lui, et ordonner qu'elle soit enfermée dans un des asiles d'aliénés de la province. (Art. 31).

Cette condition que l'aliéné soit dangereux est donc essentielle pour l'internement, et elle est et doit être également nécessaire pour la maintenue de la mesure de sécurité que la société a cru devoir prendre contre l'aliéné. Donc si l'aliéné cesse d'être dangereux, même s'il ne cesse pas d'être aliéné, il ne peut être retenu dans l'asile, sa libération doit être ordonnée lorsqu'elle est demandée.

C'est ce que soutient énergiquement *Legrand du Saulle*, à la page 714 de son *Traité de Médecine Légale*, où après avoir constaté que les hallucinés, les illusionnés, les monomaniaques et les gens frappés de débilité intellectuelle, fournissent le plus grand nombre des aliénés dangereux, il ajoute :

"Est-ce à dire pour cela, que tout halluciné, tout illusionné, tout monomaniaque, tout faible d'esprit, doivent être toujours maintenus dans un asile ? Non, assurément. Car les impulsions instinctives peuvent avoir pour objet des actes extravagants ou absurdes, mais tout à fait inoffensifs, et les monomanies intellectuelles peuvent avoir pour base une systématisation délirante qui ne conduira jamais à aucun acte dangereux."

Le seul point à décider dans une instance de la nature de celle-ci est donc de savoir si la libération de l'interné présente un danger pour la société ? Si le malade est guéri, ou si, d'un état d'excitation ou de fureur il est tombé dans un état de démence qui le rend absolument inoffensif, il ne saurait être retenu dans l'asile. (*Legrand du Saulle* p. 718).

Ces considérations nous amènent naturellement à examiner ici par quels modes la loi autorise cette libération des aliénés.

Le législateur a donné à deux autorités, l'autorité administrative et l'autorité judiciaire, le pouvoir de prononcer cette libération, mais dans des conditions différentes.

Par l'art. 19 de la loi, il est enjoint aux propriétaires des asiles d'aliénés ou aux médecins qu'ils emploient de faire dans les trois premiers jours de chaque mois, rapport au médecin visiteur de toutes les personnes internées qui peuvent être mises en liberté.

De son côté, le médecin visiteur doit faire rapport au secrétaire provincial, et s'il y a conflit entre le rapport des propriétaires ou du médecin de l'asile et celui du médecin visiteur, l'Exécutif nomme alors une personne compétente pour s'assurer de l'état de ceux au sujet desquels il y a conflit, et le secrétaire provincial décide ensuite d'après ces rapports.

Tel est le premier mode de libération organisé par la loi.

Passons au second, c'est-à-dire à celui dont l'exécution est confiée au pouvoir judiciaire.

Par l'art. 44 du Statut il est dit que :

"Toute personne placée ou retenue dans un asile d'aliénés, son tuteur si elle est mineure, son curateur, ou tout parent ou ami, peut sur simple requête et à quelque époque que ce soit, demander au tribunal du lieu de l'établissement, son élargissement de l'asile.

"Le tribunal, après enquête et audition, ordonne cet élargissement s'il y a lieu, sans délai, et sa décision est finale et sans appel."

C'est ce dernier mode de libération qui est nouveau dans notre législation et qui autorise la procédure qui s'est faite devant ce tribunal.

Les principales dispositions de cette loi de 1884 et spécialement celle que je viens de citer, sont empruntées à la Loi des Aliénés adoptée en France le 30 juin 1838 et encore en force aujourd'hui.

Il est à remarquer cependant que cet art. 44, que je viens de citer, n'est pas aussi élastique que l'art. 29 de la loi de 1838, d'où il est tiré, et que tandis que celui-ci porte simplement que le tribunal "*après les vérifications nécessaires*," ordonnera s'il y a lieu, la libération; notre article au contraire, impose pour l'exercice de cette juridiction exceptionnelle la procédure ordinaire de l'enquête et audition, avec tous les délais qu'elle entraîne et les inconvénients additionnels que j'aurai bientôt à signaler.

Le résultat de cette différence entre les deux dispositions est qu'en France la procé-

dure suivie est beaucoup plus expéditive et plus rationnelle, puisque le tribunal se contente généralement d'ordonner la constatation de l'état mental du malade, par des médecins par lui choisis, et prononce ensuite sans délai sur le rapport qui lui est soumis par ces experts.

Ici comme la loi enjoint au tribunal de procéder par enquête et audition, comme dans une cause ordinaire, il arrivera dans maintes circonstances, qu'au lieu d'avoir à prononcer sur un rapport d'expert raisonné et concluant, le juge se trouvera en présence d'opinions généralement non motivées et souvent contradictoires données par les témoins, et que l'enquête, loin de l'éclairer, ne pourra servir qu'à l'empêcher d'arriver à cette conviction nécessaire pour qu'il puisse prononcer.

Quoiqu'il en soit de l'inconvénient grave que je viens de signaler, telle est la loi, et si je ne me suis pas mépris sur l'ensemble et la portée de ses dispositions le devoir difficile et complexe qui m'incombe aujourd'hui, dans l'appréciation de cette cause, peut se résumer dans cette formule : appliquer dans une juste proportion le double principe de la liberté de chacun et de la sécurité de tous.

J'aborde maintenant la seconde question que j'ai à examiner :

20. Quelles garanties sont nécessaires pour justifier l'application de cette loi ?

En d'autres termes, dans quelles conditions le juge à qui l'on demande la libération d'une personne internée dans un asile d'aliénés, pourra-t-il accorder cette demande ?

Le tribunal, je le répète, a deux intérêts à sauvegarder, celui de la société d'abord, celui de l'interné ensuite; il ne peut perdre ni l'un ni l'autre de vue, et il ne peut prononcer la libération que s'il est convaincu qu'elle ne présente aucun danger. Or, cette conviction le juge ne saurait la trouver dans ses propres lumières, il lui faut le secours de la science médicale.

Je sais cependant que des jurisconsultes d'un grand talent ont soutenu que les médecins ne sont pas plus compétents que le premier venu pour juger si un homme est ou n'est pas sain d'esprit. *Trop long*, dans son Traité des Donations, va même jusqu'à dire que s'il fallait en croire certains médecins il n'y a pas aujourd'hui un homme que l'on ne

pourrait déclarer monomane. Et il ajoute: "Si Pascal n'était pas mort, il devrait prendre garde à lui, car je connais maint docteur qui le tient pour halluciné. Socrate est bien heureux d'être venu si tôt; il a péri du moins avec la réputation du plus sage des hommes, tandis qu'on pourrait bien trouver dans plus d'un savant écrit médical qu'il était à peu près monomane avec son démon familier." Puis après avoir rappelé le ridicule de certaines consultations qui tournent en diagnostic les choses les plus simples et les plus naturelles il ajoute: "Et l'on voudrait que nous autres juges, qui tenons dans nos mains la liberté et la capacité civile des personnes, nous fissions dépendre de si frivoles symptômes, ces grandes questions où sont engagés l'honneur des familles, la succession des biens et les droits les plus chers de l'homme."

Il serait difficile, on le voit par cette courte citation, d'exprimer plus énergiquement le peu de confiance que le juge doit accorder à ces opinions non raisonnées ou mal raisonnées données quelquefois par les médecins, et d'indiquer avec plus d'autorité la nécessité, pour le juge, de contrôler même ces témoignages qu'il appelle à son secours et auxquels il demande la lumière.

Mais, est-ce à dire que ces erreurs ou ces insuffisances accidentelles du témoignage médical doivent nous faire rejeter totalement cette source de renseignements; et serait-il logique de conclure, prenant l'exception pour la règle, que la science médicale est nécessairement impuissante à éclairer le juge dans la détermination d'un cas de folie? Je ne saurais aller jusque-là. En effet, il est admis aujourd'hui que la folie n'est pas une maladie de la raison, mais une maladie qui altère la raison. Or, comme le dit logiquement Albert Lemoine: Qui est chargé, qui est capable d'appliquer la loi? Le magistrat. De même, qui est capable, qui est chargé de connaître l'état d'un malade? Le médecin.

C'est donc le médecin que le juge doit interroger pour connaître l'état de ce malade, car c'est lui qui a ici la compétence, l'autorité. Mais, comme le dit fort bien Tardieu (De la Folie, p. 61), "pour que le médecin puisse faire passer sa conviction dans l'esprit du juge qui a réclamé son avis, il faut

"de toute nécessité qu'il lui fournisse des preuves tirées de l'observation médicale et non des formules vagues et indéfinies, aussi inutiles à la justice que peu dignes de la science."

Et Legrand du Saulle, dit pareillement à la page 683:

"Le magistrat pour tout ce qui sort de sa compétence demande plus qu'une opinion: il veut une conviction raisonnée, suffisamment motivée qui ne laisse, autant que possible, aucun doute dans son esprit. Sa conscience ne peut être satisfaite par une théorie ou un raisonnement quelque exacts qu'ils paraissent: elle exige sinon une certitude absolue, du moins des preuves suffisantes pour inspirer une conviction."

Ainsi le juge doit apprécier, contrôler ces témoignages des médecins, en déterminer même la valeur scientifique et n'en admettre les conclusions que lorsque par l'évidence des faits et l'autorité du raisonnement ils ont fait passer la conviction dans son esprit.

J'avais donc à chercher dans le témoignage médical produit devant moi cet ensemble de faits et de preuves, qu'indiquent les auteurs, et pour arriver à déterminer la suffisance de ce témoignage, j'ai dû en faire l'étude et l'analyse au point de vue des règles prescrites comme essentielles pour tout examen de l'état mental.

Or, Tardieu à la p. 66 de son *Etude sur la Folie*, nous dit que l'examen de l'état mental doit porter sur trois ordres de faits également essentiels à constater:

1o. Les troubles des fonctions intellectuelles;

2o. L'altération des fonctions sensoriales;

3o. La perversion des facultés affectives et des instincts.

Et il ajoute qu'il ne faut jamais négliger non plus l'examen de l'état physique qui fournit toujours des données fort importantes.

Si la preuve faite, dans l'espèce, couvre le terrain indiqué par Tardieu, et si sur les trois points mentionnés cette preuve est favorable à l'internée, nul doute que le tribunal doive y trouver toutes les garanties nécessaires pour accorder la libération.

Je passe donc maintenant à la troisième question que je me suis proposé d'examiner:

3o. La preuve faite dans l'espèce suffit-elle

pour justifier la libération immédiate de l'internée?

Nous avons à examiner ici, comme je viens de le dire, si la preuve constate :

1o. Le trouble des fonctions intellectuelles ;

2o. L'altération des fonctions sensoriales ;

3o. La perversion des facultés affectives et des instincts.

" 1o. *Le trouble des fonctions intellectuelles*, dit Tardieu, est le caractère ordinaire et essentiel de la folie. Tantôt il consiste dans un désordre général et absolu, marqué par des conceptions à la fois délirantes et tout à fait incohérentes, dans lesquelles la mémoire, l'attention, le jugement, la conscience ne s'exercent et n'interviennent à aucun degré ; les idées se succèdent sans suite, sans lien entre elles, avec une abondance et une mobilité extraordinaire."

D'autres fois les troubles ne sont que partiels, le raisonnement, la faculté de déduction persistent, mais les jugements sont faux.

Enfin le trouble peut être encore plus restreint, réduit même à une seule idée fixe qui s'empare de l'esprit du malade et en absorbe l'activité.

Appréciant la preuve que j'ai maintenant devant moi, à la lumière de ces définitions, que je résume autant que possible, je dois dire de suite que je n'y trouve rien qui tende à établir chez Rose Lynam ce trouble des fonctions intellectuelles qui, comme le dit l'auteur que je viens de citer, est le caractère ordinaire et essentiel de la folie.

Les divers interrogatoires qu'elle a subis devant les médecins et celui auquel elle a été soumise devant ce tribunal, éclaircissent ce premier point d'une manière satisfaisante. Et quant à ce que dit le Dr. Howard, (p. 36 de sa déposition) des réponses irrégulières qu'elle faisait à ses questions, les exemples qu'il donne me paraissent démontrer le contraire de ce qu'il affirme.

2o. *Trouble des fonctions sensoriales.* "Les fonctions sensoriales, dit Tardieu, offrent des troubles spéciaux qui constituent l'un des éléments les plus singuliers et les plus caractéristiques de la folie ; je veux parler des hallucinations, des fausses sensations, et des illusions sensoriales."

Puis donnant la définition de chacune de ces dénominations l'auteur ajoute :

" On donne le nom d'*hallucinations* à des sensations spontanément perçues en l'absence de toute impression physique et de tout excitant extérieur des organes et des sens. Les hallucinations ne diffèrent donc en réalité des sensations vraies que par le défaut d'objet ; mais à part la non existence de l'excitant, la perception est aussi réelle dans les unes que dans les autres.

" Les hallucinations peuvent être sensoriales ou viscérales ; ces dernières, qui reçoivent aussi le nom de *fausses sensations*, ont leur siège ailleurs que dans les organes des sens, soit dans les viscères, soit dans toute autre partie du corps.

" Quant aux *illusions sensoriales*, elles consistent dans l'appréciation fautive de sensations réelles."

C'est sur ce point que la preuve la plus forte a été tentée contre la demande, et je dois avouer que les dépositions des docteurs Ross et Cameron paraissaient établir d'une manière concluante que Rose Lynam avait eu des hallucinations de la vue et de l'ouïe, lorsqu'elle prétendait avoir vu son mari avec une autre femme en face de l'asile, la nuit et avoir entendu cette femme parler à son mari et lui dire : "*Come, Peter, let that one alone*," ou : "*Come along, Peter, let us go*."

Mais l'interrogatoire de la femme elle-même, le témoignage des enfants, et les circonstances mêmes du fait rapporté m'ont absolument convaincu qu'il n'y avait pas eu hallucination. Un seul point est resté inexpliqué, les paroles entendues, mais le fait que ces paroles ont du être prononcées, dans cette circonstance, me paraît tellement probable que je ne puis refuser d'y croire aussi. En effet, quoi de plus naturel que dans la situation où se trouvait Lynam, en cette occasion, debout sur le perron de l'asile et exposé aux reproches et aux injures de sa femme, désireux, par suite, de se soustraire à cette scène désagréable, anxieux d'ailleurs d'arriver à temps pour l'heure de départ du bateau, il ait lui-même pressé son compagnon, qui se promenait plus loin, en lui disant, traduisant son nom comme il avait l'habitude de le faire : "*Come along, Peters, let us go*." J'avoue que cette explication me paraît si naturelle et si

plausible que je ne puis la mettre en doute surtout en présence de la vérification absolue de toutes les autres circonstances de cette scène.

Cette preuve tentée contre Rose Lynam et si complètement détruite, tourne donc en sa faveur.

Restent maintenant sur ce point les déclarations du Dr. Howard au sujet de ce que Rose Lynam lui disait à propos de sa nourriture et de ses vêtements. M. le Dr. Howard dit y avoir vu la preuve d'*illusions*, mais je ne trouve dans les paroles rapportées dans cette partie de son témoignage (pp. 26, 27 et 30) que les récriminations d'une femme irritée de sa détention et disposée à tout critiquer même avec exagération.

Je crois donc pouvoir conclure sur ce second point comme sur le premier qu'il n'y a ici aucune preuve défavorable à la demande de libération.

J'arrive maintenant au troisième point à examiner :

3o. Troubles des *facultés affectives* et des *instincts*.

"Le trouble des facultés affectives, dit *Tardieu*, est un caractère essentiel et presque constant de la folie..... Il n'est guère d'aliéné chez lequel, à côté du trouble de l'intelligence, on n'observe une perversion égale, sinon supérieure, de toutes les facultés morales, c'est-à-dire des sentiments et des instincts. Quelquefois exaltés en apparence, les sentiments les plus naturels, celui de la maternité même, sont plus souvent déviés ou complètement abolis."

Ce point est certainement le plus important de la cause.

En effet, "C'est par des troubles du caractère, dit *Légrand du Saulle*, (p. 700) que débent presque toutes les formes de folie. Le malade devient fantasque, excentrique; il ne témoigne plus aux siens la même affection que précédemment, il commet des actes qui auraient autrefois offensé sa pudeur ou sa probité, en un mot il diffère de lui-même."

A la page 669 le même auteur dit :

"Au point de vue clinique, les signes qui révèlent la *nécessité urgente de la séquestration* sont : l'excitation maniaque, les illusions pathologiques, les hallucinations, le délire

"restreint, la perversion des facultés affectives, les impulsions instinctives, &c.

"Ces symptômes que nous indiquons et dont on n'apprécie bien la gravité que par l'étude clinique, essentiellement médicale, existent fréquemment à l'état pour ainsi dire latent, chez un grand nombre de malades. Ces aliénés que l'on redoute le moins, que l'on croit à peine malades, sont le plus souvent les plus dangereux !"

Et *Turdieu* p. 217 ajoute :

"La monomanie, même en dehors des hallucinations qui provoquent au meurtre, revêt dans certains cas rares la forme franchement homicide. Elle constitue alors une aberration des fonctions affectives, telle qu'on la voit chez certaines femmes dans l'état puerpéral ou durant l'allaitement, et chez de malheureux mélancoliques qui luttent avec désespoir, quelquefois avec succès, contre le désir de verser le sang. On se fait difficilement une idée de la violence de la lutte intérieure qui s'établit dans ces esprits malades entre l'idée fixe et la volonté. Beaucoup de faits de ce genre passent inaperçus, beaucoup aussi éclatent en crimes inouïs, auxquels manque seulement la conscience de ceux qui les commettent."

Enfin *Devergie*—1er Médecine Légale—dit que le monomane peut vivre avec le commun des hommes lorsque sa maladie n'est pas accompagnée d'erreur de sentiment.

Ainsi, d'après l'opinion de ces auteurs, la perversion des facultés affectives est un des signes qui révèlent la *nécessité urgente de la séquestration*, car du moment que l'on constate l'existence de ce trouble, l'aliéné est dangereux.

Examinons maintenant la preuve à la lumière de ces principes.

En mars 1882, Lynam se rend un jour chez son avocat pour le consulter au sujet d'une demande en séparation de corps, se plaignant que sa femme refuse de travailler, d'avoir soin de ses enfants, qu'elle est méchante, acariâtre, qu'elle ne semble plus avoir aucun souci de ses devoirs, qu'elle a même menacé les enfants de les noyer, enfin qu'elle a voulu le frapper avec une hache. L'avocat veut tenter une réconciliation entre le mari et la femme et se rend à leur domicile, mais il y trouve tout dans un désordre affreux, les

meubles bouleversés, du manger répandu partout sur le lit, les enfans effrayés blottis dans un coin, et la femme sombre et morose assise au fond de l'appartement. Ce spectacle lui indique de suite que ce n'est pas son ministère qui est requis mais bien celui d'un médecin. Il va donc, de lui-même, chercher le Dr. Howard qui, après une entrevue d'une demie heure avec la femme constate qu'elle est folle.

La procédure nécessaire est alors commencée pour obtenir son internement dans l'asile. A cette fin, elle est examinée par le Dr. Robillard, médecin ordinaire de la prison, qui la déclare atteinte de *monomanie dangereuse*. Le Dr. Mount l'examine le lendemain et certifie qu'elle est dangereuse, méchante, parlant beaucoup et s'imaginer qu'on la persécute. Son internement est en conséquence ordonné.

Tels sont les faits principaux prouvés sur ce point de la cause, et comme ils remontent à deux années et demie, il serait peut-être plausible de dire que l'on peut compter sur la guérison si un fait subséquent ne les rappellerait forcément à l'attention.

Le Dr. Cameron, au 21e feuillet de sa déposition, constate que dans l'examen qu'il a fait de cette femme il a été frappé de l'absence de sentiments maternels. Elle lui aurait déclaré elle-même, que si elle obtenait sa libération, elle ne retournerait pas avec son mari et ne s'occuperait pas d'avoir ses enfans avec elle.

Ainsi en mars 1882, elle menace ses enfans de percer un trou dans la glace et de les noyer, et en 1884 elle déclare qu'elle ne tient pas à les avoir avec elle. De plus je dois dire que j'ai été frappé, pendant toute la durée des débats, de l'absence complète de preuve de la part du Requérent, que cette femme ait jamais témoigné le désir de voir ses enfans.

Y a-t-il là une lacune intentionnelle dans le témoignage, ou un oubli fort explicable dans une procédure comme celle-ci, où, grâce au singulier système prescrit par notre loi ce sont les avocats et non les médecins qui dirigent l'expertise médicale qui se déroule devant le tribunal? Je ne saurais le dire.

Quoiqu'il en soit, ce point capital du débat me paraît loin d'être suffisamment éclairci, et j'arrive forcément à la conclusion qu'avec

la preuve que j'ai devant moi il me serait impossible de prononcer sur ce point.

Or je l'ai dit, il y a un instant, cette partie de la cause est d'une importance majeure.

Je trouve au début de cette procédure un trouble évident des facultés affectives.

Ce trouble paraît avoir persisté au moment où s'ouvre devant moi l'investigation de cette affaire.

Et de l'avis de tous les auteurs, la perversion des facultés affectives est un des signes qui révèlent la nécessité urgente de la séquestration.

Puis-je dans ces circonstances ordonner la libération et rendre cette femme à la société?

Puis-je la remettre en liberté et lui confier la garde de ses enfans?

Puis-je forcer son mari à la recevoir, et l'exposer aux violences dont elle se rendra peut-être inconsciemment coupable?

En présence de cette preuve que je viens de rappeler il m'a semblé impossible d'arriver maintenant à cette conclusion.

Mais je le répète, ce point peut être mieux éclairci, et tout ce que je puis dire pour le moment c'est que sur cette partie de la cause, il me faut plus amples informations.

Maintenant si j'apprécie la preuve dans son ensemble, je ne surprendrai personne en disant que rarement témoignages plus contradictoires ont été donnés dans une enquête. D'un côté cinq médecins, les docteurs Perrault, Duquette, Trenholme, Pickup et Wanless, sont venus déclarer formellement que cette femme n'était pas folle; d'un autre côté les docteurs Ross, Cameron et Howard affirment qu'elle est aliénée et dangereuse. Sauf le Dr. Perrault, le Dr. Howard et le Dr. Duquette, aucun des autres médecins ne l'a vue plus d'une ou deux fois. Or tous les auteurs de médecine légale sont d'avis qu'il est impossible, dans la plupart des cas, d'exprimer une opinion plausible après une ou deux visites. C'est aussi ce qu'admet le Dr. Trenholme, de même que les Drs. Ross et Cameron; seulement ces deux derniers ont été convaincus par les prétendues hallucinations dont malheureusement ils ne se sont pas donnés la peine de s'informer suffisamment.

Si donc je laisse de côté les dépositions de ces médecins, il ne reste que le témoignage des Drs. Perrault et Duquette, affirmant que

cette femme n'a jamais été folle, et celui du Dr. Howard qui déclare qu'elle souffre d'une manie aigue. Le Dr. Duquette n'ayant visité Madame Lynam que pendant quelques semaines en l'absence du Dr. Perrault, le témoignage de celui-ci, auquel je dois dire que j'attache une importance considérable, reste pour ainsi dire seul en présence de celui du Dr. Howard. C'est donc un cas de conflit d'opinions entre le médecin résident et le médecin visiteur. Or la loi elle-même déclare qu'en cas de tel conflit, si c'est l'autorité administrative qui est saisie de l'affaire, le Secrétaire Provincial décide sur le rapport d'une troisième personne compétente choisie à cette fin.

La loi ne semble-t-elle pas ainsi indiquer au juge ce qu'il doit faire dans les circonstances que je viens d'exposer ?

L'art. 322 du Code de Procédure suggère pareillement une expertise ; et enfin la jurisprudence en France, justifie aussi ce procédé.

Tardieu p. 26, dit :

"Quant à la sortie de l'aliéné supposé guéri ou en état d'être rendu à la liberté, elle appelle toute l'attention du médecin, et ne doit être autorisée que quand il est bien établi qu'elle ne peut avoir aucun inconvénient ni pour le malade ni pour d'autres. Il est arrivé plus d'une fois que la sortie de la maison de santé a été presque immédiatement suivie de rechutes dont les conséquences peuvent être déplorables. M. le Dr. Brière de Boismont a appelé l'attention sur le danger des guérisons incomplètes et a cité en exemple un malade sorti trop tôt de la maison qu'il dirigeait, sur les instances de sa famille et qui dès le lendemain tuait sa femme et ses enfants. D'un autre côté il est constant qu'il peut y avoir avantage pour les malades, à ne pas prolonger outre mesure leur séquestration. . . . Dans tous les cas il importe que la sortie, de quelque part qu'elle soit réclamée, n'ait lieu qu'après une vérification médicale sérieuse ; c'est du reste la jurisprudence à peu près constante lorsqu'une demande de sortie immédiate est adressée aux tribunaux, et je pourrais citer plus d'un jugement où la Chambre du Conseil, ne se trouvant pas suffisamment édifiée sur l'état mental de la personne retenue dans une maison d'aliénés, et dont la mise

"en liberté était demandée, a ordonné que cette personne soit vue et visitée par des hommes de l'art qui s'expliqueront sur le point de savoir s'il y aurait danger à la rendre à la société."

Je trouve en effet, qu'en France, dans une affaire qui eût un retentissement considérable en 1869 et 1870, l'affaire *Puyparlier*, le tribunal, malgré les conclusions favorables à la libération, d'une première expertise faite par les Docteurs Legrand du Saulle, Loblieux et Bouchereau, en ordonna une seconde, dont le résultat fut de faire maintenir la séquestration.

M'autorisant donc de ces dispositions de la loi de 1884 et du Code de Procédure, et aussi de cette jurisprudence interprétative d'une loi identique à la nôtre, je ne crois pas devoir prononcer avant que par un expert nommé à cette fin et qui prendra connaissance de la procédure au dossier et de la preuve déjà faite, il soit procédé à un nouvel examen de la dite Rose Lynam. Cet examen devant être fait par un médecin spécialiste qui n'ait pas encore exprimé d'opinion sur le cas actuel, je crois devoir choisir M. le Dr. Arthur Vallée, médecin visiteur de l'Asile de Beauport, qui par sa position, ses études et l'expérience que lui donne son service dans cette institution, m'inspire la plus entière confiance.

Je dois ajouter que voyant les frais considérables que les parties avaient déjà eu à supporter dans cette affaire, et considérant que la question à résoudre est en quelque sorte d'intérêt public, j'ai obtenu de l'hon. Procureur-Général de la province la promesse que les frais de cette nouvelle expertise seraient payés par le trésor public.

Je terminerai en disant que bien que les religieuses chargées de la direction de l'Asile St-Jean de Dieu aient été mises en cause dans cette procédure, les deux parties intéressées se sont accordées pour reconnaître qu'elles n'avaient aucune plainte à formuler contre elles au sujet de l'administration de cet asile et pour les exonérer de toute responsabilité à raison de cette affaire.

R. D. McGibbon for Petitioner.

C. J. Doherty for Lynam.

Hon. F. X. Trudel for Les Sœurs de l'Asile St-Jean de Dieu.

SUPERIOR COURT.

MONTREAL, October 15, 1884.

Before MATHIEU, J.

LA BANQUE JACQUES-CARTIER v. J. T. NEVEUX
et J. T. NEVEUX, Oppt.*Procedure—The merits of an opposition cannot
be tried on motion.*

PER CURIAM:—"Considérant que le mérite d'une opposition ou de certaines allégations d'une opposition ne peut pas être décidé sur motion;

"A renvoyé et renvoie les motions de la demanderesse demandant que les allégations 6e, 7e et 8e des oppositions produites par l'opposant sur la saisie des meubles et sur la saisie des immeubles faite en cette cause, avec dépens distracts à Mtre Edmond Lareau, avocat de l'opposant."

Authorities cited by opposant: 2 Legal News, p. 307; 22 L. C. J. p. 57; 1 Legal News, 471, Q. B.; 23 L. C. J., p. 181, Q. B.

*Lacoste & Cie. for plaintiff.**E. Lareau for opposant.*

COUR DE CIRCUIT.

MONTREAL, 20 mars 1884.

Coram JOHNSON, J.

D'ORSONNENS v. CHRISTIN.

*Mari et femme—Dette contractée par la femme
—Responsabilité du mari.*

JUGÉ—Que le mari est tenu de la dette contractée pour les services du médecin rendus à sa femme même lorsqu'ils sont séparés de biens.

L'action était portée en recouvrement d'une somme de \$61, valeur de services professionnels que le demandeur avait rendus en sa qualité de médecin à la femme du défendeur, durant une période de cinq années.

Le défendeur soutenait qu'il n'était pas responsable de cette dette; qu'il était marié sous le régime de la séparation de biens; qu'il avait un autre médecin qui était celui de sa famille; et qu'il avait fait annoncer dans les journaux qu'il ne serait pas responsable des dettes contractées en son nom sans une autorisation par écrit.

Le demandeur répondait que les articles 165 et 175 de notre code règlent la situation des deux époux, indépendamment de tout

régime concernant les biens, il disait: le mari est le chef de la famille, c'est lui qui le représente vis-à-vis des tiers; c'est lui qui pourvoit à ses besoins; c'est lui qui règle la dépense et contracte les obligations envers les tiers; quand la femme agit c'est en qualité de mandataire, elle ne s'oblige pas personnellement; elle oblige son mari, sans doute, dans certains cas, elle est obligée de contribuer aux charges du mariage, mais c'est à son mari qu'elle remet sa part contributive. Si elle refuse cette contribution, son mari peut la contraindre à la fournir, mais les tiers sont étrangers à ces différends entre le mari et la femme. Pour les tiers, la question consiste à savoir qui a contracté. Est-ce la femme? est-ce le mari? à qui a été fait le crédit? si c'est à la femme, c'est elle qui doit payer, si c'est au mari, c'est lui qui doit payer. Or, quand la femme a l'habitude d'agir pour le mari, quand c'est elle qui achète les objets qui servent à l'entretien de la famille, les fournisseurs ont raison de supposer qu'elle a un mandat tacite de son mari pour faire ces achats et ils ont droit de réclamer du mari, qui a, dès lors, contracté avec eux par le ministère de sa femme.

La cour a maintenu les prétentions du demandeur et a condamné le défendeur à payer la dette.

*DeBellefeuille & Bonin pour le demandeur.
Lacoste, Globensky & Bisailon pour le défendeur.*

(J. J. B.)

COUR DE CIRCUIT.

MONTREAL, 20 mars 1884.

Coram JOHNSON, J.

CHRISTIN v. HUDON et al.

Après avoir rendu jugement dans la cause précédente le juge Johnson a jugé la présente cause et s'est exprimé dans les termes suivants:

"There is another small case of Christin v. Hudon et al. for the price of ice sold, and the defendants plead compensation by the price of goods sold to the wife. The plaintiff objects to this, on the ground of the separation between him and his spouse, but the compensation is not urged against the spouse but against the husband. She was

his *mandataire* in buying these things and he is liable. Therefore the compensation is properly urged against the husband. This case has nothing to do with the principle on which *D'Orsonnens v. Christin* was founded. There, the husband was liable for medical attendance on his wife as *chef marital* of the matrimonial union, though there was, as to property merely, a separation, but the obligation of the husband to preserve his wife's life and health is unimpaired by that. In the ice case the compensation is allowed, because the obligation of the husband is to provide those things, and the wife *séparée* was his agent."

Action dismissed.

Lacoste & Cie. for the plaintiff.

DeBellefeuille & Bonin for the defendants.

(J. J. B.)

LIVING IN CHAMBERS.

THE ideal chamber life in London is, of course, to be found in the Temple or any of the other law Inns. The kind of existence passed by the inhabitants of these *hospitia* is unique. The young freshman installing himself in college rooms feels a delicious sense of independence take possession of him as he surveys the tiny domicile in which for a year or two he will play the host and petty king according to his own free will. But his will is not really so free after all. He comes to find, although these college days make the greenest memory in any man's life, that inside the precincts of a University a young fellow has to surrender a considerable portion of his liberty, and is, in some respects, more under authority than if he were within the paternal mansion. The young student at Paris fitting in and out of his *mansarde* in the Latin Quarter is indeed about as irresponsible a creature as the sparrow nesting in the walls of the house; but next week his garret may be the abode of a market porter or a milliner. His quarters have not been reserved through centuries for the occupation of educated bachelors, and he may be turned out of them at any moment at the mere caprice of the landlord, who comes monthly for his rent. The Inns of Court and Chancery, however, are the great Republic of Bachelordom. Dating from the days when

monkery flourished in our land, they have survived that monastic system, and in themselves preserve all the characteristics of what may be termed lay monasticism. Within the walls of these buildings, once you are admitted as a tenant, and provided you will pay the rather exorbitant rent, you are free to live in whatever manner of single blessedness you may choose. You are a High Churchman; fit up one of your rooms as an oratory if you like, and your neighbour, who practises an esoteric Buddhism, will not quarrel with you, or even take the trouble to find out what you are about. You are a somewhat sceptical Bohemian; on Sunday morning throw open your window and enjoy your dressing-gown, cigar, and *Observer*, while the "blessed mutter of the mass" and the sweet choir strains from the adjoining church waft themselves to your ears. You are free, if such is your mind, to enjoy the music in this fashion, and read the theatrical news while the clergyman delivers his discourse. You may keep a servant, or servants, to wait upon you, or you may, like a good many independent gentlemen, require no more assistance than the laundress can render in half an hour daily. You black your own boots with Nubian blacking; you become an expert at omelettes, and even venture at times to cook little cosy suppers for two or three. Generally, however, your eating is all done outside, in the restaurants. There are six or seven very respectable places of the kind so near that to step out to any one of them is hardly more trouble than to walk downstairs to one's ordinary private dining-room. No conventionality governs your hours. Rise when you please; there is no household to consult. Dine when you please; there is no cook in your establishment to mutter about joints being burnt and sauces wasted because the master has not returned in time. Stay out as late as you please; the night porter is paid for nothing else than welcoming you with a civil smile at four or five in the morning, and is not likely to give warning because you keep him out of bed so long. Your abode is twenty times safer by night than any West-end mansion, for it is well walled in, and no burglar can pass the sentinel at the gates. No

rumble of traffic disturbs your sleep. Your rest is as secluded as that of a friar in his cell. Is not all this the very ideal of liberty and bachelor bliss? To-morrow you may wish to start away to Switzerland or the moors. Your bag is packed; you call a cab and slam your double doors behind you, perfectly assured that all your goods and chattels are safe till you return. Diogenes, even, was not so unencumbered, for had he gone to Switzerland he would have required to take his tub with him.

The peculiarity of this Utopian Bachelorland is that you can pass so readily across its frontier into the big world. In Oxford or Cambridge you cannot breathe any but scholastic air. Here you take but a couple of steps, and out of an atmosphere filled with the past you turn into the exciting din of Fleet Street, alive with echoes of the moment from all quarters of the earth. In meditative mood you may pace about the Temple precincts in summer moonlight—*nunquam minus solus quam cum solus*—and people its hoary courts with fitting figures of the many departed great, whose lives, so to speak, have been built into its walls. Then, by way of a rousing contrast, lounge round the corner, with slipped feet, into the office of some friendly editor, and listen to the click of the telegraph machines, and the gossip bandied among the leader writers waiting for subjects, and you will realise to the full the sense of delightful anachronism that gives life in any of these ancient Inns so piquant a flavour. The West-end man of fashion, living in a gorgeous suite of rooms near St. James's Street, might as well be the guest of an hotel. The walls of his abode are not clothed with associations stretching back through generations.

We write these lines at an open window, immediately outside which is a hall surmounted with a quaint clock and bell. Beyond the hall is a quadrangle richly carpeted with mossy grass, and studded with a dozen leafy trees, sleepily rocking a few sharp-voiced sparrows on their branches. On the other side of this foliage the red-tiled roofs of a building as old as the Charles's shine with a mellow and cheerful softness in the warm sun; and immediately beyond these

roofs, again, one can see against a blue sky the massive mullions and numerous turrets of a large ecclesiastical looking building designed in the Lombardo-Gothic style. Any painter sitting in our seat could produce a picture that might be taken to represent an exquisite work in some old-world cathedral town. Yet the ecclesiastical-looking building is not a cathedral, but the London Record Office, a fine structure hidden away from the sight of most people. Under the red-tiled roof dwelt George Dyer, and thither Charles Lamb wended his way many a time to enjoy chat with the worthy bibliophile. The same red roof covered the office of the clerks to the Marshalsea Prison; and it has been said that from the room occupied by these worthies emanated more misery than from any other room in the metropolis. The little hall surmounted with the clock and bell is the very hall where Sir Matthew Hale, after the Great Fire of London, sat with a council to determine the new boundaries of the City. It was of our own quarter of this beautiful Inn of Chancery that the old gentleman at the "Magpie and Stump," in "Pickwick," tells the strange ghost stories; and Charles Dickens loved the place well. This little Inn, with a whole history of its own, is as modest as it is delightful. Standing back at the end of a passage leading from Fleet Street, it obtrudes itself so little on the passer-by that not one Londoner in a hundred knows of its existence, and many a cabman will be found to confess he does not know it by name. In such nooks it is that men grow into confirmed old bachelors. Like Elia they "hang posterity," and love antiquity more and more. We will not say that a long life altogether spent like this is well spent. Human sympathies are apt to become musty and wither if they are too long subjected to the test of such an isolated existence. A few years of chamber life, for any thoughtful man in his youth or prime, will probably do him more good than harm. But too long experience of its loneliness tells on the character. Further, a man past his best is subject to actual calamities attendant on this loneliness. It is only recently that a distinguished baronet retired to his rooms in the Temple one evening, and next day was found in bed lifeless. He had passed away in the lonely darkness with no human ear to hear his dying groan. And such cases are far from uncommon.—*Standard*.

The Legal News.

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THE BOUNDARY QUESTION.

When an accomplished disputant and a practised writer, like Sir Francis Hincks, fills nearly a column and a half of a daily paper in the endeavour to answer an article on a subject he perfectly understands, without adding a single idea to the controversy, we may surmise two things:—first, that the article requires an answer; second, that there is none to give.

The intention of the writer of these lines is not to play into the hands of those opposed to his views by swelling the amazing mass of literature under which the simple question of the western boundary of Ontario has been obscured. Also, it may save Sir Francis a great deal of unnecessary trouble if he will at once believe that I am constitutionally not very sensitive to banter, and that the antiquated form of sarcasm he has adopted is scarcely calculated to disturb the equanimity of one much more susceptible than I am. What is said may be of some importance in argument, it can scarcely be important who says it, so it matters not whether I am a "legal luminary" or not. The question is, whether I am right. Beyond that question I do not intend to be deceived. The due north line is a definite pretension, and it is entirely based on the Act of 1774. When Sir Francis Hincks has made up his mind as to what is the title of Ontario to anything west of that line, we shall be glad to have it stated, if possible, in a condensed form, and in technical language. If, on the other hand, the award of Sir Francis and his colleagues can only be justified on the convenience of having a natural boundary, and on its economy by saving the costs of survey, as he seems now to intimate is the case, then we are not at issue on any point in which I take an interest, and I must remain convinced, as I have always been, that the award was as unfair as it was illegal.

R.

STATUS OF COLONIAL QUEEN'S COUNSEL.

The *Law Journal* (London), referring to the opinion given by Sir Henry James (*ante*, p. 321), says:—"The Attorney-General has expressed an opinion in reference to the *Boundary Case* recently heard by the Judicial Committee of the Privy Council, that there is no reason why equal rank should not be given to Her Majesty's Counsel in the Colonies with Her Majesty's Counsel in England in Privy Council cases. In the case in question, Mr. Scoble, Q.C., of the English bar, did, in fact, take a brief as junior to Mr. Mowat, Attorney-General of Ontario. The opinion of Mr. Reeve, the registrar, coincided with that of Sir Henry James, except that he added, 'of course, the English Attorney and Solicitor-General lead everybody.' Why so? If as between Colonial and English Queen's Counsel the senior leads, as between Colonial and English Attorneys-General the senior leads. The office of Attorney-General in England is no more or less an imperial office than the office of Queen's Counsel in England."

The same query suggested itself to us on reading the opinion of the registrar, but we concluded from the words "of course," that Mr. Reeve spoke from information not in our possession. It would certainly look rather singular if the Attorney-General of some very small and insignificant Province (no reference intended to Ontario) took precedence of the Attorney-General of England.

COLONIAL ATTORNEYS' RELIEF BILL.

The Secretary of State for the Colonies has transmitted to the Governor-General of Canada, a copy of the Imperial Act, 47 & 48 Vict. c. 24, entitled "An Act to amend the Colonial Attorneys' Relief Act." The following is the text of the Act:—

CHAPTER XXIV.

An Act to amend the Colonial Attorneys' Relief Act.

[3rd July, 1884.]

Whereas it is expedient to extend the provisions of the Colonial Attorneys' Relief Act as to certain colonies or dependencies:

Be it therefore enacted by the Queen's most

Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Upon application made by the governor or person exercising the functions of governor of any of Her Majesty's colonies or dependencies, and after it has been shown to the satisfaction of Her Majesty's Principal Secretary of State for the Colonies, that the system of jurisprudence, as administered in such colony or dependency, answers to and fulfils the conditions specified in section three of the Colonial Attorneys' Relief Act, and also that the attorneys and solicitors of the superior courts of law or equity in England are admitted as attorneys and solicitors in the superior courts of law and equity of such colony or dependency, on production of their certificates of admission in the English courts, without service in the colony or dependency or examination, except in the laws of the colony or dependency in so far as they differ from the laws of England, Her Majesty may, from time to time, by Order in Council direct the Colonial Attorneys' Relief Act to come into operation as to such colony or dependency, although persons may in certain cases be admitted as attorneys or solicitors in such colony or dependency without possessing all the qualifications for admission or having fulfilled the conditions specified in the said section three, and thereupon, but not otherwise, the provisions of the Colonial Attorneys' Relief Act shall apply to persons duly admitted as attorneys and solicitors in such colony or dependency after service and examination; that is to say, no attorney or solicitor of any such colony or dependency shall be admitted as a solicitor of the Supreme Court in England unless, in addition to the requirements of the Colonial Attorneys' Relief Act, he prove by affidavit that he has served for five years under articles of clerkship to a solicitor or attorney-at-law in such colony or dependency, and passed an examination to test his fitness and capacity, before he was admitted an attorney or solicitor in such colony or dependency, and further that he has since been in actual practice as attorney or solicitor in such colony or dependency for the period of seven years at the least.

2. This Act may be cited as the Colonial Attorneys' Relief Act Amendment Act, 1884.

RINGING OF CHURCH BELLS—WHEN A NUISANCE.

In connection with a question which came before the Recorder's Court at Montreal not long ago, (*ante*, p. 257) it may be well to refer to a case decided last year by the Court of Appeals, St. Louis, Mo.—*Leete et al.*, App. v. *The Pilgrim Congregational Society et al.* The question was when the ringing of church bells will be regarded as a nuisance and restrained by injunction. The opinion of the Court seems to us sound, and may be read with advantage by those who are called upon to decide similar points. Thompson, J., for the Court, said :—

"The question in all cases of this kind is, whether the inconvenience complained of ought in fact to be considered as more than fanciful, more than one of mere delicacy and fastidiousness, as an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes or habits of life, but according to plain, sober and simple notions among the people. Applying these principles to the facts of the case, we are clear of doubt that we ought not to enjoin, restrain or in any way interfere with the ringing of these bells for religious worship on Sunday. The quarter-ringing is convenient and pleasurable generally to good people living in the vicinity of the church. This ringing takes place only in the daytime, and mingles with the ordinary sounds of the street. It cannot be greatly disturbing to persons of ordinary habits and temperaments, and an overwhelming preponderance of evidence shows that it is not disturbing to such persons, but pleasurable. The plaintiffs have not produced a single witness, except themselves, who have testified to being seriously annoyed or incommoded by this quarter-ringing in the daytime. We are therefore justified, under the principles already stated, in holding that this ground of their complaint has not been clearly made out, so as to enable them to relief by injunction, until they have established the fact by a verdict and judgment at law, that this particular ringing is a nuisance to them in their dwellings, and accordingly we decline to make any order touching the

quarter-ringing. The same may be said of the striking of the hours in the daytime upon the largest bell. As to the ringing of the large bell by rope and wheel, the evidence satisfies us that this is a very severe and disturbing noise, but this ringing does not appear to have been done habitually. It was not habitually done at the time of the bringing of the suit, and the record affords no ground for the conclusion that the defendants have any purpose of again ringing the large bell in this way. But the striking of the clock at night must, we think, be relegated to the category of useless noises.

"It is not necessary that the hour should be sounded upon a large bell at night. There is no doubt that in the still hours of the night the striking of this bell, particularly at 10, 11 and 12 o'clock, when numerous strokes are delivered, is, in its vicinity, a disturbing noise. No possible sentiment can be ministered to by perpetuating such a noise when people generally are asleep. Because a number of witnesses testified that the striking of the hours at night did not disturb them, it cannot be possible that the law of Missouri is in such a state that one man cannot claim at its hands protection against a useless sound which disturbs his repose because a hundred other men may not in like situation, be disturbed by it. We therefore think that the striking of the hours upon the largest bell between the hours of 9 o'clock p. m. and 7 o'clock a. m., ought to be enjoined.

"This decree will be reversed and the cause will be remanded to the circuit court, with directions to enter a decree that its direction or authority be perpetually enjoined from ringing the bells between the hours of 9 o'clock p. m. and 7 o'clock a. m., so as to disturb the sleep or rest of the plaintiffs or either of them in their respective dwelling houses. In the ordinary course of proceedings the circuit court will not become again possessed of the cause for the purpose of entering and enforcing the decree which we have ordered until the October term. In the meantime the season of the year is upon us when the windows of sleeping rooms in dwelling houses must be kept open, and when the plaintiffs will accordingly suffer the greatest measure of injury from the

striking of this bell at night which they suffer at any period of the year. To obviate this we shall enter a restraining order in this court suspending the striking of the bell at night within the hours named until such time as the circuit court shall have again become possessors of the case. It is ordered accordingly. All the judges concur."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, Oct. 8, 1884.

Before DORION, C.J., RAMSAY, TESSIER, CROSS and BABY, JJ.

SCOTT (def. below), Appellant, and THE BANK OF QUEBEC (plff. below), Respondent.

Promissory note—Relation of parties thereto to third party—Novation.

The contract expressed on the face of a negotiable instrument cannot be varied without an express agreement. Knowledge that the parties to a note occupy between themselves a relation different from that expressed on the face of the note, is not sufficient to alter their relations to a third party having such knowledge.

Giving notes for a previous debt does not operate novation, unless the intention be evident.

RAMSAY, J. This is an action by respondent against the maker of a promissory note for \$650, at four months, payable to the order of James Shortis, and endorsed by Shortis over to the Bank.

The defendant pleads first that this note was made by him for the accommodation of Shortis—that he never had any value for it, and that Shortis promised him, the defendant, that he would pay it, and that he, defendant, would not be troubled about it. That on the 30th March, 1880, the plaintiff knew this fact. That on the last named day Shortis was indebted to the bank for sundry notes drawn by different parties and endorsed by Shortis, and discounted for his use, to the amount of \$39,015, and among them the note now sued upon. That being aware of the agreement between Scott and Shortis, and that Shortis was the person really liable on the note, the Bank, without the knowledge or consent of defendant, took four pro-

missory notes for the payment of this sum of \$39,015, payable in six, twelve, eighteen, and twenty-four months from the said date. That the bank further took an hypothec for the payment of this sum of \$39,015, and by this means diminished the property of Shortis so as to render him insolvent, and that, therefore, Shortis could not validly grant any preference over his other creditors. Wherefore he concludes for the dismissal of the action.

By a second plea defendant sets up the same matter and alleges that the transactions of the 30th March, 1880, operated a novation of the debt, and further, that the note was returned to Shortis, whose endorsement was effaced, as appears by the note.

By a third plea defendant pleads payment.

The two questions substantially before us are:—first, whether knowledge that the parties to a note occupy between themselves a different relation than that expressed on the face of the note, is sufficient to alter the relations of these parties towards a third party having such knowledge?

Second. Whether the transaction of the 30th March, 1880, created a novation of the debt?

With regard to the former of these questions it appears to be well-settled law in England, that knowledge coming to a third party after he has accepted the note is nothing, and that to modify the contract as expressed on the face of the note, between the parties and the payee, it is necessary there should be an express agreement. The principle is this, the contract expressed by the instrument binds, and carries with it all its incidents, unless it be set aside by something else. So if A. and B. bind themselves to C. as principal and surety, it is of no importance whether C. was aware of an equity existing between A. and B. or not. In this case no special agreement is alleged, but simply that the Bank knew, on the 30th March, 1880, how matters stood between Shortis and defendant. In the case of *Clarke et al. & Wilson*, an action on a joint and several promissory note, where the plea was that defendant made the note for the accommodation of one T. Scott, and that he had no value, and that of all this the plaintiffs

had knowledge, Lord Abinger said: "The plea should have set out some contract that was binding on the plaintiff. All that he states is, that he waited six months before he commenced his action." (3 M. & W. 210.) In the case of *Manley & Boycott*, Lord Campbell, C.J., lays down emphatically the doctrine that there must be a special agreement and that mere knowledge is neither here nor there. (2 E. & B., p. 54.)

And in the case of *Strong & The Northamptonshire Banking Company*, 17 C. B. 201, a rule was refused defendant on the suggestion that defendant was only an accommodation promisor of a note, and that the party who got value for the note, got delay from the plaintiff knowing the circumstances. C. J. Jervis said: "You clearly cannot, at law, vary the contract which appears upon the face of the note;" and then, "I speak with reference to the action upon the written contract."

It may perhaps be said that the equity rule allows more latitude. In the case of *Hollier & Eyre* (9 C. & K. 1) Lord Cottenham said, that it was clear that between themselves certain grantors bore the relation of principal and surety, but that they were all principals as regards the grantees by the deed, that the question whether one of the grantors between himself and the grantees was a principal or only a surety for the payments of the annuity by another must be ascertained by the terms of the instruments themselves, and that no extraneous evidence was admissible for the purpose of establishing this, "and upon that," he said, "I think there is no room for doubt." He then went on to explain that in equity there might be relief given if knowledge were established and with it a course of dealing which raised an equity in favour of the party.

I am not prepared to say how far the rules of equity, as understood in England, go, or to what institutions of our law they correspond; but we may fairly presume, I think, that law alone with us covers the whole legal field which law and equity together embrace in England. At all events, it is not difficult for us fully to deal with the case indicated as an exception by Lord Cottenham. We take it to mean that the acts of the parties to an instrument may be of so formal and decided

a character that they establish a new contract. This is perfectly in accordance with our law, and we call it novation. Or, there may be evidence of a contract from the beginning modifying the contract on the face of the note; of which I shall give an instance later. Or, it may be, that the dealings of some of the parties are so injurious to the interests of another as to give him an equitable right to get rid of his obligation, although I cannot at this moment suggest an example as likely to arise in dealing with bills of exchange and promissory notes.

Admitting, then, all Lord Cottenham said, to be good law here, how can it help defendant? He had to show that knowingly the bank intended to alter the legal relations of the defendant and Shortis, as regards it, and to treat Shortis as principal, and Scott as surety. He has endeavoured to prove, by Shortis' evidence, that Mr. Wotherspoon knew that between Shortis and Scott, it was agreed, that Shortis was to pay the note, and again by the testimony of Rickaby that Wotherspoon must have known it.

Let us suppose for an instant that this is good evidence, which probably it was not, as its object was to contradict the written instrument, and it only establishes knowledge without any implied expression of consent to alter the conditions of the parties to the note towards the bank. The next step of the evidence on which defendant relies, is that the contract itself implies an intention to vary the original deed. On the contrary, the transaction of the 30th March, 1880, was precisely such a dealing as the Bank had a right to have with the endorser without in any way disturbing its relations with the drawer. That is to say, the Bank treated the parties as they represented themselves, so there is no presumption from that of the intention to make a new contract. Now, have Shortis and the Bank, by anything they have done, damnified the defendant? It seems to us they have not. The injury suggested by appellant is that Scott's recourse against Shortis was stopped by the transaction of the 30th March. This is not tenable. It must be admitted that Scott's legal position compelled him to look after his note without notice. Now suppose he was

ignorant of, and non-consenting to, the transaction between Shortis and the Bank, he could have compelled Shortis to pay, and Shortis' dealing with the Bank would have been no answer to defendant in Shortis' mouth. His obligation to defendant, if the story be true, is to relieve him of the note, and no operation short of that would answer Scott's action.

If the story be not true, Scott has, of course, no reason to complain of the bargain. It should be remembered that the effect, on the obligation of the surety, of discharging the principal does not rest on any equitable consideration. It arises *ex natura rei*. The principal goes, and the accessory disappears simultaneously, or, as the code puts it (1929 C. C.) "Suretyship is the act by which a person engages to fulfil the obligation of another, in case of its non-fulfilment by the latter."

The case of *The Liquidators of Overend, Gurney & Co. and The Liquidators of the Oriental Financial Corporation* (L. R. 7 H. of L. 348), is an instance of bills of exchange being received on special conditions in writing, which altered the contract as it appeared on the instruments. This case then falls within one of the categories I have drawn from Lord Cottenham's judgment in *Hollier & Eyre*, and in no way applies to the present case. As we think Shortis was not the principal on this contract, it is not necessary for us to enter upon the question as to what constitutes a discharge of the principal.

The second plea need hardly be alluded to. We have already shown that there is no novation express or implied established. Giving notes for a previous debt implies no novation. *Noad & Lampson*, 10 L. C. R. 29. In other words the intention to operate novation must be evident. (1171 C. C.)

A small point has been put forward as to an erasure of the endorsement. The circumstances are satisfactorily explained, and any presumption that might have existed disappeared. (1181 C. C.) We do not think the renewal of the endorsement has anything to do with the matter, except in so far as it serves to fortify Mr. Wotherspoon's evidence as to the circumstance of effacing the endorsement. It seems to us that the second en-

dorsation was made by Shortis, and this disposes entirely of his pretension that he was to get back these notes.

We therefore think the judgment of the Court below was right, and this appeal must be dismissed with costs.

Judgment confirmed.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 23, 1884.

Before DORION, C.J., MONK, RAMSAY, TESSIER and BABY, JJ.

C. M. ACER, Petitioner, and THE EXCHANGE BANK OF CANADA, Respondent; also C. M. ACER et al. Petitioners, and THE EXCHANGE BANK OF CANADA, Respondent.

Bank in liquidation—45 Vic. (Can.) cap. 23—Contributory.

It is not necessary that ordinary debtors (not shareholders) of a bank in liquidation be settled on a list of contributories before actions are instituted against them by the liquidators.

In these two cases the respondent, plaintiff in the Court below, sued the petitioners, defendants in the Court below, who were alleged to be debtors of the Bank.

The declarations alleged the insolvency of the Exchange Bank and its liquidation under the Statute of Canada, 45 Vict. cap. 23, the indebtedness of the petitioners, with conclusions accordingly. The petitioners pleaded dilatory exceptions on the ground that if true as alleged in the declaration, they were "contributories" under the Statute, and before any suit could be taken against them they must be settled on the list of contributories to the Bank as provided in the Act. Admissions were filed that the petitioners were not settled on any list of contributories.

After argument Mr. Justice Loranger dismissed the exceptions. Hence the present petitions for leave to appeal from these judgments.

It was urged that according to the tenor of the Statute all the proceedings for or on behalf of the Bank were entirely under the supervision of the Court.

Sec. 5 was quoted, defining a contributory to be a "person liable to contribute to the assets of a company under this Act."

Secs. 32, 35, 37, 41 and 71 were cited to show that the use of the word contributory referred to any debtor of the Bank and did not simply mean a shareholder.

Secs. 47, 51, 52 and 54 were also cited to show the extended meaning of the word, and that these referred to contributories who were more than shareholders or who might be indebted for amounts *exclusive of calls*.

Finally, sec. 76 was quoted to show that if a shareholder only was a contributory, then ordinary debtors might purchase claims against the bank and use them as an offset.

The Court unanimously decided that a contributory was a stockholder, and that an ordinary debtor did not come within the meaning of the term.

Petitions for leave to appeal rejected.

Hall for Petitioner.

Greenshields for Respondent.

COURT OF REVIEW.

MONTREAL, Sept. 24, 1884.

Before TORRANCE, PAPINEAU, GILL, JJ.

ROSS et vir v. SWENNEY et al.

Executor—Removal from office—Inscription in Review.

Where a testamentary executor has been removed from office by a final judgment of the Supreme Court, he will not, subsequent to such judgment, be permitted to inscribe in Review, from a judgment dismissing an action brought by him in his quality of executor.

The female plaintiff sued in her quality of testamentary executrix, and her action was dismissed on the 4th August, 1884. She immediately inscribed in Review, namely, on the 13th August, against the judgment. She was already defendant in an action taken by Dame Jessie Ross et vir to deprive her of this office. This suit was successful in the Superior Court on the 10th December, 1881, by judgment which was confirmed by the Court of Queen's Bench on the 21st December, 1883, and by the Supreme Court on the 23rd June, 1884.

W. H. Kerr, Q.C., for defendant, now moved that the inscription be struck, on the ground that the female plaintiff had been deprived of her office of testamentary executrix by the

said judgments: *Kerby & Ross et al.*, 18 L. C. Jurist, 148.

R. Laflamme, Q. C., *e contrà*, said he had to inscribe within eight days, and his client was heir for one-half.

The COURT was of opinion that the inscription should be struck.

Motion granted.

Laflamme, Huntington, Laflamme & Richard for plaintiff.

Kerr, Carter & Goldstein for defendants.

COUR DE CIRCUIT.

Montréal, 16 octobre 1884.

Coram JOHNSON, J.

GOLDIE et al. v. BISAILLON.

Saisie-revendication—Vente de la chose d'autrui—Vente à terme avec rétention du droit de propriété—Bail.

JUGÉ :—*Qu'une personne qui vend un meuble et retient son droit de propriété jusqu'au parfait paiement des billets promissaires représentant le prix de la vente, ne peut saisir revendiquer ce meuble entre les mains d'un tiers de bonne foi, lorsqu'il a été vendu à ce dernier par l'acheteur avant l'échéance des billets.*

Il en serait autrement, et le propriétaire pourrait saisir revendiquer son meuble, si ce dernier eût été perdu ou volé, par exemple, si le propriétaire l'eût loué avec stipulation que le locataire deviendrait propriétaire en remplissant les conditions du bail, et que le locataire l'eût vendu.

PER CURIAM. The plaintiff sold a safe to one Leveillé, taking promissory notes in payment which are not yet due; and stipulating with the purchaser that the right of property in the thing sold was to remain with the vendor until the notes were paid. The safe was delivered to Leveillé and before the maturity of the first note he sold to the defendant in whose hands the plaintiff now revendicates this safe and calls the first purchaser, Leveillé, into the case. The defendant pleads, 1st, that the action is premature, Leveillé not being divested of his right of property until the first note was due and unpaid. 2nd, that Leveillé was in possession and had a right to sell to him, and that he was in good faith when he bought, and being

neither leased, nor lost, nor stolen, he had a right to buy in ignorance, as he was, of the stipulations between plaintiff and Leveillé.

Leveillé, *mis en cause*, pleads very much the same thing, and adds that the plaintiff could have no right to proceed even against him without offering back the notes, which he does not do; and having suspended the exercise of his right, whatever it was, during the pendency of the notes, he, Leveillé, is not *déchu de ses droits*. The defendant relies on art. 1488 and 1489; and the court is with him. I think that a sale of the property of another is valid, it is an ordinary commercial transaction, and where there is good faith in the purchaser, and where the thing has not been lost or stolen.

The case of *Bertrand v. Gaudreau*, 12 Rev. Lég., p. 154, was cited by plaintiff. It was different from this. The judge there evidently decided that Malouin could not sell the horse because it did not belong to him. There had been a lease of which the conditions when fulfilled were to constitute the lessee owner: The learned judge on that particular point, however, (although every other incidental question was most carefully examined, and supported by numerous authorities) only cited the article 1487, and said "Malouin a vendu ce cheval qui ne lui appartenait pas, conséquemment il a vendu la chose d'autrui, et par l'art. 1487 la vente de la chose qui n'appartient pas au vendeur est nulle. The article cited says *not* that the sale of the property of another is null in all cases, but expressly excepts the cases mentioned in the three succeeding articles, which are, 1st, art. 1488: "La vente est valide s'il s'agit d'une affaire commerciale, ou si le vendeur devient ensuite propriétaire de la chose." Art. 1489: "Si une chose perdue ou volée est achetée de bonne foi dans une foire, marché, ou à une vente publique, ou d'un commerçant trafiquant en semblables matières, le propriétaire ne peut la revendiquer sans rembourser à l'acheteur le prix qu'il en a payé." There is a case not cited at the bar which leaves me in no doubt about the decision I ought to give in this. It is the case of *Brown v. Lemieux* in appeal (Rev. Lég., vol. 3, p. 361); the decision there is stated in the *breviate* thus: "Que le vendeur non payé, qui n'a pas vendu

sans jour et sans terme, n'a que l'action en résolution et non l'action en revendication, encore, qu'il se soit réservé son droit de propriété jusqu'à parfait paiement et le droit de reprendre la chose, même sans procédés judiciaires." I think, moreover, that the case of *Bertrand v. Gaudreau* is distinguishable from this on another ground, which is cited in the case of *Brown v. Lemieux*; and it is this. Troplong, Priv. et Hyp. No. 184, says: "S'il vendeur n'avait pas accordé de terme; s'il n'avait livré la chose qu'à titre précaire, à titre de bail, par exemple, alors il pouvait garder la chose *jure pignoris*, ou la reprendre comme lui appartenant encore. This was evidently the case in *Bertrand v. Gaudreau*, therefore I do not disagree with that case.

Here, however, there certainly was a sale; and the stipulation as to the right of property remaining in the vendor, gave him no right to revendicate even as against the purchaser, much less as against a subsequent purchaser. For these reasons the action of the plaintiff is dismissed with costs.

A. N. St. Jean, avocat des demandeurs.

J. C. Lacoste, avocat du défendeur.

De Lorimier, conseil pour le défendeur.

(J. J. B.)

CANADA GAZETTE NOTICES.

The Scottish Imperial Insurance Company gives notice that it has ceased to transact business in Canada.

Messrs. William Cooper and F. B. Matthews, of Montreal, have been appointed liquidators of the Colonial Building and Investment Association.

A general meeting of shareholders of the Federal Bank of Canada is to be held at Toronto, Nov. 20, to consider a proposition to reduce the capital stock of the Bank.

The liquidators of the Exchange Bank of Canada give notice that claims are to be filed on or before December 1st, 1884. Claims are to be made up to the 22nd November, 1883, the date of the commencement of the winding up.

GENERAL NOTES.

The *Chicago Legal News*, referring to a recent case in Ontario, asks whether it is not a contempt of Court for any one to advertise as an attorney after he has been disbarred.

In consequence of the unauthorized publication of private state papers, it is said that Sir William V. Harcourt will introduce a bill making the betrayal of government papers a penal offence, alike for the person who sells and for the person who publishes them.

Chief Justice: "Mr. Williams, we think you ought to accredit this court with some knowledge of the law, and not occupy so much time in discussing elementary propositions." Mr. Williams: "May it please your Honors, I did so accredit the court below, and did avoid, therefore, the discussion of elementary principles, and for that reason I have been obliged to take this appeal."

The New York Court of Appeals has decided, in the case of *Murphy v. Orr*, that whoever drives horses along the streets of a city is bound to anticipate that travellers on foot may be at the crossing, and must take reasonable care not to injure them. He is negligent whenever he fails to look out for them, or when he sees and does not, so far as in his power, avoid them; and it is sufficient to show that if the driver had looked he would have seen the person injured in season to avoid him.

A man wants a piece of his neighbour's land to improve the approaches to his house, but the owner objects to sell, except under conditions. In the meantime a public body requires the land compulsorily, but does not want the whole of it, and sells the surplus portion to the original owner's neighbour, who turns it to his desired purpose, free of all restrictions. Has the involuntary seller any remedy against the second buyer? None whatever, says Mr. Justice Chitty, in deciding such a case at Camberwell, where the School Board had been the purchasers under compulsion. Good law, doubtless, but rather hard, notwithstanding. The law calls this "*damnum absque injuria*." The suffering party generally thinks the first syllable sufficient.—*English Paper*.

Of the viceroys of India the first, Lord Canning, was English; the second, Lord Elgin, Scotch; the third, Lord Laurence, Irish; the fourth, Lord Mayo, Irish also; the fifth, sixth and seventh, Lords Northbrook, Lytton and Ripon, were English. The appointment of Lord Dufferin re-establishes an Irishman on the viceregal throne. For some time it has been a common joke in London "that our only general," Wolseley, and "our only ambassador," Dufferin, were both Irish. This vicereignty of India, it is stated, has been through Lord Dufferin's whole career, his point of aspiration. It is a mistake to suppose that money is to be made, as in the days of Clive and Hastings, or saved out of the salary of \$125,000 a year in the office, but it permits the husbanding of private fortune, and Lord Dufferin's finances need repair.—*Ex.*

The Legal News.

VOL. VII. NOVEMBER 1, 1884. No. 44.

THE LAW REPORTS.

We are receiving from all sides the most gratifying expressions of approval of the new system of Reports. Those who have considered the subject are unanimously of opinion that the step now taken is one that must be advantageous to the profession. The remark has been made to us, however, whether the *Legal News* may not lose some of its interest by the withdrawal of full reports of the Superior Court and Appeal decisions. Our arrangements for the *Legal News* under the new system are not yet complete, but we think, taking the last two as average numbers, that the apprehension of a falling off in interest is shown to be unfounded. We have reports of a number of judgments in the Circuit Court, a judgment in Appeal at Quebec, &c., none of which fall within our regular system, and will not be repeated in the "Montreal Law Reports." Some of the advantages accruing to the *Legal News* will be, (1) More speedy publication of short notes of current decisions. (2) Increase in the number of notes embraced in each issue. (3) Increased space for articles and correspondence on current topics, and on subjects of interest to the bar. (4) Increased space for decisions in rural districts. (5) Increased space for notes of important contemporary decisions in England, France and the United States upon branches of the law similar to our own. It is proposed, moreover, that the *Legal News* from 1st January next shall be delivered at half price (\$2 per annum) to all subscribers to the "Montreal Law Reports."

JUDICIAL WORKSHOPS.

The buildings provided for judges and lawyers to do their work in, are seldom all that could be desired. In England Mr. Justice Stephen loses his way in the intricate and confused maze of the new law Courts. (7 L. N. 256.) The St. Louis Court House has become an unsavory refuge for tramps (7 L. N. 89). Chicago also boasts a new Court

House, but it is so unsatisfactory that the *Chicago Legal News* recently mentioned the following fact in reference to it:—

"A few days ago, one of the best judges on the bench said, "My court room is dark, and I have to burn gas most of the time. The air heated by the burning gas is extremely injurious to my health. I feel that I am breaking down from this cause, and at the expiration of my term next year, I shall resume my practice at the bar."

Thereupon Mr. J. A. Crain, a lawyer of Freeport, sends the following suggestion to the editor:—

"For twenty years I have had over each gas-burner in my office, a pipe leading into a chimney, which pipe carries off all heat and noxious effects of the gas when burning. Tell the judge mentioned in *Legal News* of 18th, and oblige."

LORDS BRAMWELL AND COLERIDGE ON THE SALVATION ARMY.

A correspondent who asked a question of Lord Bramwell, as to the law in regard to the Salvation Army, received the following reply:—

"There is no statute law on the subject you mention. By the common law, if any one or more, either by stinks, noises, or otherwise, make the neighbourhood unwholesome or distressing to its inhabitants, a public indictable nuisance is committed, and the offender may be fined and imprisoned. But it must be a sensible grievance, and not one to fastidious people only; and it must be one not affecting one or two persons only, but the neighbourhood generally. You will find all this mentioned in Russell on 'Crimes,' vol. i. book ii. c. 30, s. 1, fourth edition. But I recommend you to lay a case before counsel, stating what facts can be proved. He will be able to advise you on the facts and law of your particular case, an opinion on which is worth much more than one on law only."

While upon this subject we shall quote a passage from the judgment of Lord Chief Justice Coleridge in *Beatty v. Glenister*. We had not seen this judgment when we referred to the case of the Salvationists in Montreal (*ante*, p. 257). It will be observed that

his Lordship goes much further than we ventured to do in our remarks, for there is a manifest difference between merely singing a hymn on a public square and parading the streets with beat of drum and other instruments. His Lordship says (the italics are ours):—

"As well might it be said that Wesley had 'created a disturbance' when he went to preach in Oxford, at Lincoln College, and the undergraduates mobbed him and pelted him with mud. In one sense, no doubt, he had created it, for he went there, and they did not like him; and it might be said in a sense that he had 'headed' the crowd that followed him, but he could not help that, and it was not his fault. So here, the defendants had only 'caused a disturbance' or 'headed a crowd' in that sense and no other, and they ought not to have been convicted. *Singing hymns or shouting 'Hallelujah!'* was not 'brauling' and creating a disturbance within the meaning of the law, nor was playing an instrument out of tune an offence against the peace. He sometimes wished it was. The proceedings of the Salvation Army might not always be such as he might like or approve, but they had their legal rights as other people had, and these rights were not to be interfered with unwarrantably. It was not because the magistrates or some of the inhabitants did not like these proceedings of the Salvation Army that, therefore, they had a right to interfere with them if not against the law. And this was an attempt to strain the law so as to make it operate against practices which were not liked or approved of, but which were not offences against the law. The conviction, therefore, was wrong, and must be set aside."

BUSINESS FAILURES IN CANADA.

The number of failures in the Dominion during the three months ending with September, as reported to Messrs. Dun, Wiman & Co., was as follows:—

	Number.	Liabilities.
1884.....	227	\$4,112,892
1883.....	314	3,439,891
1882.....	166	1,715,982
1881.....	130	787,889
1880.....	130	1,219,763
1879.....	417	6,998,617

Although the liabilities of traders who have failed during the past quarter are larger than in the corresponding period of any preceding year since 1879, the number of insolvents is more than 25 per cent. less than last year. This increase of liabilities has been due to the failure of two or three large firms, as for example that of Fawcett & Co., private bankers, whose liabilities exceeded a million dollars, but compensation in some measure is found in the fact that the assets have more than correspondingly increased. Taking the full period of nine months, the failures in the past six years rank thus:—

	Number.	Liabilities.
1884.....	979	\$14,855,492
1883.....	1,001	11,688,951
1882.....	537	5,832,552
1881.....	479	4,690,747
1880.....	779	6,888,611
1879.....	1,484	24,424,570

SUPREME COURT REPORTS.

To the Editor of the LEGAL NEWS:

SIR,—As the plan announced in the last number of the LEGAL NEWS does not embrace a full report of the Supreme Court decisions, I would suggest that some publication which is not entering into the extension of the LEGAL NEWS should make it a specialty to publish reports of the Supreme Court cases. The reports now published by authority are most unsatisfactory, especially for the Province of Quebec. There is not a proportion equal to 10 per cent. of the decisions reported. We have had most important cases, upon the decision of which other actions pending before the provincial courts depend; *Harrington v. Corse* in particular, and after over two years no report has so far seen the light, although repeatedly asked for. The length of the reports published is discouraging for any one. To find out the enunciation of a useful principle of law applicable to another case, is almost impossible in those prolix deliverances. When we read a book, there is a summary of matters and an index somewhere to shorten the labour. In these endless reports you have to go through a mass of useless matters before you find out what you want. And when one judge has explained the facts, why should we be

afflicted by quintuple repetitions? It is high time that private enterprise should take hold of this standing necessity. And if it is done, I for one will not disturb anybody by obtaining a copy of the authentic reports.

D.

[We have not verified the percentage mentioned by our correspondent, who is a senior Queen's Counsel, with a large practice before the Supreme Court; but we are under the impression that the Province of Quebec cases before the Supreme Court are especially in arrears as far as reports are concerned.—ED. LEGAL NEWS.]

THE COURT OF REVIEW.

To the Editor of THE LEGAL NEWS:

SIR,—It has been evident for some time past, that the system adopted by the Court of Review, with regard to hearing country cases, is working an injustice to the advocates practising in the city, and to the litigants before the Courts here: and as the result of this term's work has brought this out more glaringly than ever before, it may be useful to call the attention of the Bar and the Judges to the matter more forcibly by publishing the actual figures.

In this month of October the Court has sat four days, nominally devoting two days to country cases and two to those of this district. This, to begin with, gave an undue proportion of the time to the country cases, as there were only 22 on the roll out of a total of 65; one being an election case. But as we come to examine the working of the system, the disproportion appears more and more abnormal. On the first day of the Court, the election case, and one privileged case, were heard. The second and third days were devoted to hearing cases from the rural districts. On the fourth, two Montreal cases were heard, and then the insatiable country litigants claimed the privilege again, as having been represented by city advocates, who had the day before yielded their place to their rural confrères. The result of the term's work stands as follows: 1 election petition; 1 privileged case; 1 motion; 3 Montreal cases, and 11 country cases heard. In other words, half of the country cases on the roll were disposed of, and only one-thirteenth of the city cases. It

is well for us to be courteous to our country brethren, and for the Court to be complaisant in its arrangements for their convenience; but we must not altogether forget the interests of our clients and ourselves, nor fail to remember that complaisance may degenerate into stultification.

If we turn to the September list we do not find much comfort, but only indications of the October fiasco. Out of 80 cases on the roll, 27 were from the rural districts, and there was one election case. The Court sat longer than usual in the attempt to diminish this heavy list; five or six days, if I remember rightly, devoting three days to country cases. Five motions were heard, one election case, and one motion in a jury case; 10 city cases were heard on the merits, and 14 country cases!

I have not sufficient spirit left to proceed further with this investigation; enough has been said to show that some radical change is needed in the system upon which this Court is managed.

I would humbly suggest that the Court should adopt some system, as to country cases, like that which works so well in the Court of Appeal:—taking them in their turn upon the roll as far down as the Court might expect to reach; or devoting only one day out of the four, and that the last, to these cases. Taking them last would relieve the Bar here from much uncertainty as to their cases being called;—and would cause no inconvenience to our confrères; but, on the contrary, would make their day fixed, instead of uncertain as at present.

It would relieve the roll very much if the election cases could be heard on a day set apart, and not in the regular term. They are invariably lengthy, and generally take up at least one of the days set apart for city cases.

The roll is not made up on a logical system. Cases called and not argued should go to the bottom of the list, and lose their turn on the roll for the next term. To give an instance of how the present system works, I may mention a case which was reached in September, on the last day at 3.30 p.m. The Court adjourned without hearing the parties, who were ready. This term it was the 9th on the roll instead of the first! and it has not yet

been called. I learn from the clerk that the old roll is re-copied for the next term, simply leaving out the cases heard, the others remaining in the same order as when first put on. Surely there is room for improvement here.

Trusting that these remarks may have some effect,

I remain, Sir,

Your obedient servant,

A CITY PRACTITIONER.

Montreal, 25th October, 1884.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 20, 1882.

Before MONK, RAMSAY, THESIER, CROSS & BABY, JJ.

MONDELET et al. (plffs. below). Appellants, and ROY (def. below), Respondent.*

Servitude—Seigniorial Act of 1854—Evidence.

By deed of partition, in 1811, between the proprietors of a seignior, it was agreed that the co-partitioners should not erect for their own profit any grist or saw-mill on their respective portions, within a league of the mills then existing on the seignior. By deed of sale in 1850, a piece of land forming part of the same seignior was sold by the representatives of one of the co-partitioners, with a stipulation that the purchasers and their representatives should never build nor permit to be built any flour mill or grist mill, whether such mill were operated by water, steam or any other motive power.

In an action brought to compel the respondent to demolish a grist mill:

Held, 1st. That the deed of 1811 created a reciprocal servitude in favor of each portion of the seignior divided by the deed of partition.

2. That if this servitude was in its nature a seigniorial servitude, it was abolished by the Seigniorial Act of 1854, whether the servitude be considered as a principal right or as an accessory of the right of *banalité*.

3. That if the servitude was not seigniorial,

* To appear in the Montreal Law Reports, 1 Queen's Bench.

it was constituted in favor of a seignior, and it disappeared by the concession of the real estate in favor of which it was created.

4. That the deed of sale of 1850 did not create a real servitude, but only a personal obligation, inasmuch as no *héritage dominant* was mentioned therein.

5. That the existence of a *héritage dominant* not mentioned in the deed cannot be proved by verbal evidence.

RAMSAY, J., delivered the judgment in appeal, by which the judgment of SCOTT, J., Superior Court, St. Hyacinthe, was confirmed.

Mercier, Beausoleil & Martineau for the Appellants.

Lacoste, Globensky & Bisillon for the Respondent.

SUPERIOR COURT.

MONTREAL, Sept. 30, 1884.

Before LORANGER, J.

GILMAN v. THE ROYAL CANADIAN INSURANCE COMPANY.*

Company—Forfeiture of shares—Sale of confiscated stock.

Held, that the company, defendant, had the right to confiscate and sell shares on which the calls were not paid within the time fixed by notices regularly given. It was not necessary to mention the shares in detail in the advertisement of sale, nor to set forth the amount paid on each share. The intention of the directors to sell the forfeited shares as if all past due calls were paid up, and subject to the payment of all future calls, was regular and legal.

The action to set aside the forfeiture of shares, and to prevent the sale of the shares at public auction, was dismissed.

A. W. Atwater for the plaintiff.

N. W. Trenholme, counsel.

Bethune & Bethune for the Royal Canadian Insurance Co.

Geoffrion, Rinfret & Dorion for Thibaudan et al., directors.

L. N. Benjamin for Robertson et al., directors.

* To appear in the Montreal Law Reports, 1 S. C.

SUPERIOR COURT.

MONTREAL, Oct. 6, 1884.

Before MOUSSEAU, J.

GILMAN v. ROBERTSON et al., and THE ROYAL
CANADIAN INSURANCE Co., *mis en cause*.**Company—Sale of shares—Election of Directors.*

Held, the sale of the Kay stock mentioned in the plaintiff's declaration was regular and legal, and, moreover, the plaintiff having acquiesced therein, had no right to complain.

2. The defendants Archer, Ostell, Hodgson and Moss had no need of re-election as directors on the 7th of February, 1884, and such re-election did not legally affect their then status of directors until the annual meeting of the company in 1885.

3. The remaining directors were all duly and legally elected at the meeting of the company held on the 7th of February, 1884.

4. All the said directors were duly qualified under the charter of the company.

Action dismissed.

Trenholme, Taylor & Dickson for plaintiff.*Maclaren, Leet & Smith* for defendants,
Robertson et al.*Bethune & Bethune* for defendant Ostell and
the *mis en cause*.*Kerr & Carter* for defendants Archer et al.

SUPERIOR COURT.

MONTREAL, Oct. 15, 1884.

Before LORANGER, J.

HODGSON et al. v. LA BANQUE D'HOCHELAGA
et al.**Libel in a plea—When action therefor may be
instituted.*

Held, 1. An action of damages, founded upon defamatory statements contained in a plea, may be instituted before the termination of the suit in which the plea in question was filed.

2. Pleadings containing defamatory statements respecting a party to the case are privileged only when the allegations are pertinent to the issue, and when filed in good faith for the purpose of legitimate defence.

Demurrer dismissed.

Kerr, Carter & Goldstein for the plaintiffs
Beique, McGoun & Emond for the defendant
La Banque d'Hochelaga.*Abbott, Tait & Abbotts* for the defendant
the Molsons Bank.

COUR DE CIRCUIT.

MONTREAL, 4 septembre 1884.

Coram LORANGER, J.

LACHAPELLE v. LAROSE.

*Collecteur exigeant honoraire pour coût d'une
lettre.*

JUGÉ : 1. *Qu'un agent ou collecteur, n'a pas droit d'exiger \$1.50, ni aucune autre somme, pour le coût d'une lettre écrite à un débiteur lui réclamant sa dette.*

2. *Que dans le cas actuel, le défendeur sera condamné à rembourser au demandeur \$1.50, coût d'une prétendue lettre d'avocat par lui écrite au demandeur de la part du nommé Edouard Richelieu et qu'il s'était fait payer en qualité d'agent.*

Voici la teneur de la déclaration du demandeur :

Qu'en la cité de Montréal, il aurait payé au défendeur la somme de \$1.50 aux dates suivantes, savoir : \$1.00, le 10 décembre 1880 et \$0.50, le 7 janvier 1884, ainsi qu'il appert aux reçus du défendeur produits au soutien des présentes, et ce, pour le coût d'une prétendue lettre d'avocat que lui aurait envoyée le défendeur de la part d'Edouard Richelieu.

Que la dite lettre n'était pas une lettre d'avocat, mais avait été écrite par le défendeur et signée de son nom, en qualité d'agent, et qu'il n'avait aucun droit à la dite somme de \$1.50.

Que le défendeur n'est pas avocat, mais que pour mieux surprendre la bonne foi et profiter de l'ignorance du demandeur qui est entièrement illettré, comme pour mieux le tromper et le frustrer, il se serait faussement représenté comme avocat, en qualifiant sa dite lettre de "lettre d'avocat" : appert par l'exhibit No 2 du demandeur.

Que le demandeur a payé au défendeur la dite somme sans la lui devoir, par erreur, ignorance de cause et sous la fausse impression qu'il s'agissait d'une lettre d'avocat.

Qu'en obtenant ainsi la dite somme, le défendeur s'est rendu coupable d'extorsion,

* To appear in the Montreal Law Reports, 1 S. C.

Que pour les causes susdites, le demandeur est bien fondé à demander la répétition de la dite somme de \$1.50 etc. etc.

Le défendeur ne plaida pas à cette action, et la cour, après examen des témoins et audition au mérite, accorda au demandeur les conclusions de sa déclaration.

Action maintenue.

J. G. D'Amour, proc. du demandeur.

(J. G. D.)

COUR DE CIRCUIT.

MONTRÉAL, 10 septembre 1884.

Coram LORANGER, J.

BROWN et al. v. GORDON et McARTHUR et al.,
Tiers-saisis.

44 & 45 Vic. c. 18—*Journalier—Gages.*

Jugé: 1. *Qu'aucune autre personne que le journalier (homme de peine), n'a droit de se prévaloir de l'acte de la législature de Québec 44 et 45 Vic. ch. 18, lequel pourvoit à ce que "les gages échus des journaliers ne soient saisissables que pour un montant n'excédant pas la moitié des dits gages."*

2. *Que le défendeur en cette cause, qui est employé dans une fabrique de papier à tapisserie et dont l'occupation est de peindre ou graver les fleurs sur ce papier, n'est pas un journalier et n'a pas droit au bénéfice du dit acte.*

Les tiers-saisis en cette cause, firent la déclaration suivante :

"That at the time of the service made upon us of the writ of *saisie-arrest* issued in this cause, said defendant was in our service and worked and was paid by the day. That at the date of said service of the said writ, there was due and owing to the defendant, as his pay for six days, the sum of \$12; one half of which sum is liable to seizure under and by virtue of 44 & 45 Vic. ch. 18. The price agreed to be paid to defendant is \$2 a day and he is paid every fortnight."

A l'encontre de la prétention émise dans cette déclaration, que la moitié seulement du salaire du défendeur était saisissable, les demandeurs prétendirent que le défendeur n'était pas *journalier*, il était plutôt *artiste* et que son salaire entier était saisissable. Il n'y avait, suivant eux, que le *journalier* proprement

dit, en d'autres termes l'homme de peine, qui pût invoquer le bénéfice du statut. Les hommes de profession, les artistes, les artisans ou hommes de métier, bien que payés à la journée, à la semaine ou au mois, comme la chose peut arriver quelquefois, ne seraient pas pour cela *des journaliers*, ni d'après la signification de ce mot, ni dans le sens que la loi y attache, et ne pourraient réclamer le bénéfice du statut promulgué uniquement pour venir en aide au pauvre journalier.

Afin de mieux déterminer à quelle classe appartenait le défendeur, il fut lui-même examiné comme témoin et tout en se disant journalier, il admit cependant que ses occupations dans la manufacture des tiers-saisis, était de dessiner ou graver les fleurs sur le papier à tapisserie fabriqué dans cet établissement. Et après l'avoir entendu, la cour déclara qu'il n'était pas *journalier* et n'avait aucun droit au bénéfice du statut; et, en conséquence, condamna les tiers-saisis à payer aux demandeurs, le montant entier des \$12 qu'ils avaient déclaré devoir au défendeur.

J. G. D'Amour, pour les demandeurs.

Le défendeur, en personne.

(J. G. D.)

RECENT ONTARIO DECISIONS.

Negligence — Sufficiency of Railway Bell — Speed of trains in cities, etc. — Fencing track on highway — Contributory negligence. — By the Consolidated Railway Act, 1879, every locomotive engine shall be furnished with a bell of at least thirty pounds weight, which shall be rung at the distance of at least eighty rods from every crossing over a highway, and be kept ringing until the engine has crossed the highway. The judge charged the jury, that the object was that a person passing at the crossing should receive warning of the approach of the train, and the bell must be such a bell as would reasonably give that warning. *Held*, a proper direction.

By the same Act no locomotive shall pass through any thickly peopled part of any city, etc., at a speed greater than six miles an hour unless the track is properly fenced. *Held*, that this applies as well to the crossing of a highway as to other parts of a city, etc., and that the defendants were guilty of a breach of the Act in running a train at a

greater speed than six miles an hour across a highway in a village where the only portion of the track not properly fenced, was that portion which crossed the highway.

The plaintiff was well acquainted with the locality in question, and had known it to be a dangerous crossing for many years, yet when approaching it in his waggon he did not look to see if a train was coming, though he could have seen the train in question in time to have stopped his horses before reaching the track. He did not observe the train until he was on the track, and it was too late to avoid being struck. The jury found for the plaintiff. *Held*, that there was evidence of contributory negligence, and a new trial was directed.—*Corrigan v. The Grand Trunk Railway Co.* (Queen's Bench Division).

Gratuitous bailment—Negligence—Liability of bailee.—The plaintiff left a sum of money with the defendant, a shopkeeper, for safe keeping. The money was put in a safe in the defendant's shop, but when the plaintiff applied for it the next day, the defendant told him that it had been taken out and he could not give it to him. On the evidence, the jury found, in answer to questions submitted to them, that the defendant was wanting in ordinary diligence in taking care of the money, in unlocking the drawer in which it had been placed, and leaving it unlocked while he went to the cellar to get goods for customers, who were then left alone in the shop, and that the money was lost through the defendant's negligence. They also found that the defendant wrongfully appropriated the money. Judgment was directed to be entered for the plaintiff upon these answers, and the court refused to disturb the judgment.—*Porteous v. Meyers* (Queen's Bench Division).

Broker—Pledge of stock—Sale by pledgee.—The plaintiff, a broker, pledged stock with the defendants, also brokers, for advances, the plaintiff's object being to buy stock largely and hold it for a rise in the market, and it was agreed that if the plaintiff was in default for interest, or in keeping up margins, the defendants could sell the stock on two days' notice. The defendants being in need of the stock, used it. Subsequently they alleged the plaintiff was in default, and he being

ignorant of the disposition of his stock gave the defendants his notes for the amount claimed by them. Afterwards he ascertained that his stock had been sold. The defendants pleaded the custom of brokers as to their right to sell the stock. *Held*, that the custom alleged was not proved, nor would it be valid; that the parties might agree to be bound by such a mode of dealing, but in this case no such agreement was proved. *Held*, also, that the defendants might lawfully have repledged to enable them to raise their advances to plaintiff, but that the sale and other disposition by them without notice to plaintiff, and without default on his part, were wrongful, and entitled the plaintiff to recover the prices at which defendants sold the stock.—*Mara v. Cox et al.* (Queen's Bench Division).

RECENT U. S. DECISIONS.

Insurance Policy—Agreement to Assign—Measure of Damages.—The measure of damages for failure to assign a fire insurance policy to the purchaser of the property insured is the cost of procuring a similar policy, and not the amount of injury by fire to the property which the plaintiff neglected to re-insure. *Loker v. Damon*, 17 Pick. 284; *Miller v. Mariner's Church*, 7 Greenl. 51; *Grindle v. Eastern Express Co.*, 67 Ma. 317; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304.—*Dodd v. Jones*, S. J. C. Mass., 18 Rep. 306.

Common Carrier—Limited Ticket—Right of Ejection—Manner of Exercise of Right—Excuse.—1. A common carrier has a right to eject from its cars a person holding a ticket limited as to time, who claims the right to ride on presentation of such ticket and refuses to pay his fare. 2. Such right must, however, be exercised reasonably; the carrier has no right to eject an intruder in such manner as to endanger his safety; and while the carrier is not required to put off the intruder at a station or stopping-place, it cannot put him off at a place where his life or health would be endangered. 3. Where the conductor of a railway train has ejected an intruder at an improper place, it is no excuse, in an action for damages against the corporation, that the conductor told the intruder to leave at the next station the train came to, and that

nevertheless the intruder rode past the said station.—*Texas and Pacific Railway Co. v. McDonnell*. Ct. of App. of Tex. 18 Rep. 187.

Carriers—Through Lines—Respecting Liability of Connecting Carriers—Delivery—Block in Through Lines—Loss by Fire—Negligence.—Several connecting carriers having entered into certain contract arrangements for continuous transportation on through bills of lading, at settled rates of compensation, providing that each line should be responsible alone for its acts or omissions, do not thereby become liable as partners for the undertakings, representations, or misconduct of the carrier who receives merchandise from the shipper. Where cotton was delivered to a carrier to be transported from Memphis, Tennessee, to Woonsocket, Rhode Island, upon through bills of lading, exempting liability from fire, issued by the receiving carrier in pursuance of such arrangement between the connecting carriers, and the cotton was delayed at Norfolk by reason of a block caused by accumulation of freight on the line intended to convey it therefrom, and was stored in the defendant's warehouses, where it was burned. *Held*, that the company so storing the cotton was not bound to send the cotton forward by other lines, and was not liable for the loss. The fact that the company had effected an insurance on the cotton is unimportant. *Deming v. Norfolk & W. R. Co.* Circuit Court, E.D., Penns. 21 Fed. Rep. 25.

CRIMINAL LAW.

Autrefois acquit—The greater crime includes the lesser.—Where a grist mill, and all its contents, including the books of account of the owners of the mill, are destroyed by one single fire, and the defendant is prosecuted criminally for setting fire to and burning the mill, and on such charge is acquitted, *held*, that such acquittal is a good defence to a subsequent prosecution for setting fire to and burning the books of account.—*State v. Colgate*, Supreme Ct., Kan., Central L.J., May 16, 1884.

Evidence—Drunkenness—Intent.—Drunkenness is admissible in evidence on the question of intent, where the intent is an element in the constitution of the offence, and without

which the offence could not be committed; and if the accused was in such a condition of mind from intoxication as to be incapable of forming such intent, he could not have committed the crime or incurred guilt.—*People v. Blake*, Supreme Ct., California, Pacific Reporter, June 19, 1884.

Homicide—Extenuation—Evidence.—The accused hearing from his sister that A. had whipped their brother, became greatly enraged, went out instantly and killed A. *Held*, the circumstances of the whipping, which the accused did not know at the time of the killing, are incompetent to prove provocation. The provocation which excuses must be something which a man knows of and resents at the time he does the killing, not what time or accident afterwards brings to light.—*Johnson v. Commonwealth*, Supreme Ct., Kentucky, *Colorado Law Rep.*, June 19, 1884.

CANADA GAZETTE NOTICES.

John Macpherson Hamilton, of Sault St. Marie, barrister-at-law, is gazetted Queen's Counsel, and the same gentleman is appointed District Judge for the Provisional Judicial District of Thunder Bay.

The appointment by the Hon. George Irvine, Q.C., Judge of Vice-Admiralty Court for Lower Canada, of the Hon. Thos. McCord, one of the Justices of the Superior Court, as Deputy Judge of the Vice-Admiralty Court, is approved by the Governor General, the appointment bearing date 6th Oct., 1884.

GENERAL NOTES.

At the last extension of the borough franchise in England an old worthy being found entitled to a vote was canvassed for it by each of the contending parties. His answer was,—“Na, na: I ha'e waited fifty years for a vote, an' noo that I ha'e got, I mean to keep it.”

While Radical processions are marching through the streets of London, with banners inscribed, “Down with the Lords,” the Mikado of Japan is busy organizing a peerage. He has created eleven princes, twenty-four marquises, seventy-six counts, three hundred and seventy-four viscounts, and seventy-four barons.

The contents of the September-October number of the *American Law Review* are:—1. Corporate Taxation; 2. Sunday and Sunday Laws; 3. Law Reforms in Germany; 4. Suing the State; 5. Are Persons Born within the United States *Ipsa Facto* Citizens thereof; 6. Notes; 7. Correspondence; 8. Book Reviews; 9. Other Books Received; 10. Bi-monthly Digest of Cases Reported in the Law Periodicals. The contents are, as usual, of a high order of excellence.

The Legal News.

VOL. VII. NOVEMBER 8, 1884. No. 45.

LEGAL BUSINESS.

Several of our contemporaries, both in the United States and in England, have referred lately to a falling off in the volume of legal business. So far as England is concerned the decline, if it exists at all, has not affected the cause lists, for the *Law Journal*, of Oct. 25, says:—"The Cause Lists for the forthcoming sittings show an increase as compared with those of Michaelmas, 1883, in all business except divorce, which shows a slight decrease. The Court of Appeal has 422 entries, as against 399 last year, and 248 the year before. The Chancery Division has 842 entries, as against 809 last year, and 778 the year before. The Middlesex Nisi Prius causes are 1,118, as against 886 last year, and 600 the year before. Of these, 586 are for trial without juries, as against 146 last year. The Divisional Court business shows 247 entries, as against 214 last year. The Divorce List has 206 entries, as against 214 last year, and 170 the year before." And yet the *Law Times* of June 21 said: "The number of barristers who earn a decent living appears every year to diminish, and at the present moment it may be safely said that the dearth of new business is unprecedented. On the other hand, the number of 'distressed members' increases."

COLONIAL DEPENDENCE.

The symbols of royalty, in the eyes of our esteemed neighbour, the *American Law Review*, are as red rags to a bull. Every reminder that the British empire holds sway over a portion of this continent elicits a fresh outburst of mingled amazement, indignation and contempt. We accept, of course, the warmth displayed by our contemporary as a flattering indication of his friendly interest in our welfare, and we shall not even be guilty of the impertinence of suggesting, that as independence and annexation to the United States are not live questions here, are not espoused by any political party

amongst us, the columns of a law journal are occupied to little purpose in recommending them. The curious feature of the *Review's* article is that what are assumed to be Canadian grievances, are about the last things of which Canadians are disposed to complain. "It will be a cold day in England" when any of the British colonies gives to "England a Lord Chancellor, or even a "Colonel of Dragoons." A colony did give to England not long ago a very prominent minister, and Canadians are not unknown in the Imperial military service. But the fact is that Canadian ambition does not tend very strongly in that direction. Canadians are probably much prouder of having given a champion carsman to the old country and to the world than they would be of giving a general to the British army. But if they wished to become Colonels of Dragoons we don't know what obstacle lies in the way.

The *Review* repeats a misstatement to which we think we referred some time ago; that the "best places in Canada" are "filled by "Englishmen foisted upon the Canadians by "Imperial influence." This is a misapprehension. The Canadians appoint their own judges, their own bishops, their representatives in Parliament. Ministers only hold office by the will of the majority elected by the people. The professional classes are exclusively Canadians. Where, then, are the best places that are monopolized by Englishmen? The office of Governor-General, it is true, is filled by Imperial appointment, but so long as England has men like Lord Dufferin, Lord Lorne and Lord Lansdowne to send us, we think that will hardly be counted a grievance. Our contemporary proceeds to make what, we fear, must be regarded as a rash promise. "If Canada were "free, she would in course of time, and by a "natural movement, become a member of "the American confederation. The Canadian provinces would add four States to "the American Union; the highest offices "within the gift of the republic would be "opened to Canadians; *Americans would de-light to honor themselves by making such a "statesman as Sir John A. Macdonald their "President; and the conservative influence "of Canada in American politics would be*

"very salutary." But does intellectual supremacy win the Presidency? The history of the United States during the last thirty or forty years would hardly establish such a proposition, and if our neighbours do not honor their own best men with the highest place, what ground is there for assuming that they would accord such a distinction even to "one of the ablest of living statesmen," as Sir John is courteously and we think deservedly termed?

THE TICHBORNE CLAIMANT.

The great impostor who occupied so much of the attention of the courts and of the public ten or twelve years ago, has been released on a ticket-of-leave, there being three years and four months of his sentence not yet expired. What a ticket-of-leave implies, is not generally known here, and we avail ourselves of the following summary of the conditions from the *Law Journal* :—

"His license to be at large on ticket-of-leave is on the terms that he produce it when called upon, that he abstain from any violation of the law, that he do not associate with notoriously bad characters, nor 'lead an idle and dissolute life without visible means of obtaining an honest livelihood.' He must, on his release, personally notify his residence at the police office of the district in which he is, and any change of residence which he may make within the district from time to time. If he goes from one police district to another, he must personally notify his residence to the police of the district which he is leaving and the district to which he goes, and he must, once in every month, report himself at a police office. If he fail to make the necessary notification within forty-eight hours, or fail to report himself regularly, he is liable on conviction to forfeit his license, or to be imprisoned for one year with hard labor. If he break any of the somewhat vague conditions of his license, he is liable to be sent to prison with hard labor for three months, and if he be convicted of any indictable offence, his license is forfeited. Finally, a whip-hand is kept over the convict, by the license being in force only 'unless it shall please her Majesty sooner to revoke it,' so that the convict may be sent back to serve his term whenever the Home Secretary in his discretion may think proper."

NEW PUBLICATIONS.

NATURALIZATION AND NATIONALITY IN CANADA; Expatriation and Repatriation of British Subjects; Aliens, their disabilities and their privileges in Canada. The Naturalization Act, Canada, 1881; with notes, forms, and table of fees to be taken by commissioners, justices of the peace, notaries public, stipendiary and police magistrates, clerks of courts, registrars and other officials; with appendix containing treaty, etc.; also naturalization laws of the United States, with forms, etc. By Alfred Howell, of Osgoode Hall, Barrister-at-law. Author of "Surrogate Courts Practice." Carswell & Co., Publishers, Toronto and Edinburgh.

Within the compass of a slim octavo of 132 pages, Mr. Howell has brought together a considerable amount of information, to assist those who may be called upon to advise persons contemplating naturalization or desirous of obtaining the benefit of other provisions of the Naturalization Act. The census of 1881 showed the population of foreign nationalities resident in the Dominion to be 124,369, and the accessions since that date to the vast territory recently opened in the Northwest are very large, so that the subject is of growing importance to the profession. In the earlier portion of his work the author treats of the old rule of perpetual allegiance in the United Kingdom, Canada and the United States. The authorities and cases are collated with care, and the essay will be found generally interesting. The book is issued at a low price (cloth, \$1.50, half calf \$2), and will doubtless have a large circulation.

REPORT OF THE COMMISSIONERS ON THE CONSOLIDATION OF THE STATUTES OF CANADA.—
Printed by order of Parliament, 1884.

The present Report comprises a draft of 62 chapters, forming a large proportion of the work to be done under the Commission. To each chapter a table is appended, showing what Acts are proposed to be consolidated, the portion consolidated, the portion which it is proposed to repeal, the portion to be consolidated elsewhere, &c. When changes of any extent have been found necessary, a note in

smaller type has been inserted, indicating the nature of the change. The Commissioners state, with reference to the consolidation of the Criminal law, that their attention was directed to the draft Criminal Code prepared in England in 1878, by the Royal Commission appointed to consider the law relating to indictable offences. In considering the English draft Code and comparing it with the provisions of the present criminal law of Canada, it was thought advisable to prepare, for the consideration of Parliament, a bill to constitute a Code of indictable offences for Canada, in the preparation of which, advantage could be taken of the labors of the English Commission. This draft Code is printed with the present Report.

The result of the labors of the Commission has for some time been impatiently expected by the profession, and it may be hoped that the present instalment will soon be followed by the remainder of the draft of consolidation.

DE CONJECTURIS ULTIMARUM VOLUNTATUM, by W. P. Emerton. James Thornton, Publisher, Oxford.

This was a Theme composed as an exercise for the degree of D.C.L. It is written in the Latin of the Pandects, but the author has kindly added a concise translation in the margin, together with copious notes at the foot of the page. Some great English names appear in a disguise which forcibly reminds us of the American version of certain French Canadian names. Thus (p. 18) Mansfield is referred to as *DeAgrohominiis*, and Blackstone as *Gulielmus de Nigro Lapide*. The treatise has doubtless proved a useful exercise to the writer, and by its vivacity may contribute to the diversion as well as profit of the reader.

NOTES OF CASES.

COUR SUPÉRIEURE.

MONTREAL, 30 mai 1884.

Coram LORANGER, J.

LA BANQUE JACQUES-CARTIER V. PINSON-NEAULT ET AL.*

Conseil de famille—Tuteur—Ratification.

La cour a jugé, 1. Que la composition d'un conseil de famille en partie par des amis, lors-

* To appear in the Montreal Law Reports, 1 S. C.

qu'il y a suffisamment de parents, et la nomination d'un tuteur étranger, ne sont pas des causes de nullité absolue, mais seulement relative, et ne peuvent être invoquées utilement que lorsque la chose a été faite frauduleusement et au préjudice des droits des mineurs.

2. Que des mineurs devenus majeurs ne peuvent se plaindre de l'administration de leur tuteur lorsque depuis leur majorité ils ont accepté son compte, lui ont donné une décharge, et ont fait actes d'héritiers.

Lacoste, Globensky, Bisillon & Brosseau pour la demanderesse.

Judah & Branchaud pour les défenderesses.

COUR SUPÉRIEURE.

MONTREAL, Oct. 27, 1884.

Coram JETTÉ, J.

LA BANQUE D'HOCHELAGA V. MASSON, et FAIR es qual, intervenant.*

Délai—Motion—Reprise d'instance—Procédures par un liquidateur d'une compagnie insolvable—45 Vict. (1882) ch. 23, sect. 33.

Jugé, 1o. Qu'un avis de motion signifié le 11 du mois pour le 12 est insuffisant; mais si la motion est continuée à un jour ultérieur, le but de la loi, qui est de donner un délai raisonnable, est atteint, et la motion devient régulière.

2o. Qu'une reprise d'instance peut se faire par motion aussi bien que par requête.

3o. Que nonobstant la prohibition contenue dans la section 33, du ch. 23 de la 45 Vict. (1882 fédéral), le liquidateur d'une compagnie insolvable peut faire des procédures valides en son nom personnel aussi bien que comme "liquidateur de la compagnie."

Étique, McGoun & Emard pour la demanderesse.

Duhamel & Rainville pour le défendeur.

Macmaster, Hutchinson & Weir pour le requérant.

COUR SUPÉRIEURE.

[En chambre.]

MONTREAL, 18 Oct. 1884.

Coram MATHIEU, J.

DÉCARY V. L'HON. J. A. MOUSSEAU, et LOUIS B. D'Aoust, intervenant.*

* To appear in the Montreal Law Reports, 1 S. C.

Acte des élections contestées de Québec, 1875, et ses amendements—Intervention—Jurisdiction.

Jugé, Que lorsque l'instruction d'une pétition d'élection est terminée et que l'inscription pour audition devant la Cour Supérieure, siégeant en Révision, a été faite et produite, une intervention de la part d'un électeur, demandant à être reçu partie dans la cause à la place du pétitionnaire, ne pourra être reçue par la Cour Supérieure présidée par un seul juge, ou par un juge de cette cour, vu que la cause ne se trouve plus alors devant cette cour, mais se trouve devant la Cour Supérieure siégeant en Révision.

J. A. Descarries pour le demandeur.

Lacoste, Globensky, Bisillon & Brosseau pour le défendeur.

Mercier, Beausoleil & Martineau pour le requérant.

COUR SUPÉRIEURE.

[En Chambre.]

MONTREAL, 2 avril 1884.

Coram MATHIEU, J.

MASSICOTTE v. BERGER et al. *

Assignment en matière d'élection municipale contestée dans la cité de Montréal.

Jugé, Que d'après la charte de la cité de Montréal (37 Vict. ch. 51, sect. 25), il n'est pas nécessaire, dans le cas de contestation d'une élection municipale, que le bref d'assignation soit signé par le juge, ou que le défendeur soit assigné à comparaître devant le juge.

A. N. St. Jean pour le requérant.

Mercier, Beausoleil & Martineau pour le défendeur.

COUR SUPÉRIEURE.

MONTREAL, 25 Octobre 1884.

Coram LORANGER, J.

MASSICOTTE v. BERGER et al. *

Election municipale pour la cité de Montréal—Nomination—Quo warranto.

Jugé, Que dans les élections municipales pour la cité de Montréal, la loi ne déterminant aucun délai pour la mise en nomination des échevins à partir du moment où

* To appear in the Montreal Law Reports, 1 S. C.

l'assemblée est ouvert, le temps d'agir est laissé à la prudence du président et à la diligence des candidats.

A. N. St. Jean pour le requérant.

Mercier, Beausoleil & Martineau pour le défendeur.

SUPERIOR COURT.

MONTREAL, Sept. 9, 1884.

Before LORANGER, J.

Ex parte DORAN es qual, Petitioner for mandamus, and McNALLY et al, Defendants. *

Minor—Building Society.

Held, that a minor may hold shares in the capital stock of a Building Society incorporated under the provisions of chapter 69 of the Consolidated Statutes of Lower Canada, and that such shares are liable to confiscation for violation of the by-laws regulating the payment of calls.

2. That the confiscation of shares, under the conditions authorized by the by-laws of the Society, is an act of administration within the powers of the board of direction, and it is not necessary that it be authorized by the Society itself.

The demurrer to the *requête libellée* of the petitioner asking that the minor be reinstated by the liquidators as a shareholder was maintained.

Judah & Branchaud for the petitioner.

Doherty & Doherty for the defendant.

SUPERIOR COURT.

QUEBEC, July 12, 1884.

Coram CARON, J.

In re JOHN C. ENO, Petitioner for Habeas Corpus.

Extradition Act of 1877—Forgery—False Entries—Foreign Indictment as proof.

The petitioner had been arrested in Quebec on the 10th June, 1884, on a warrant of arrest under the Extradition Act of 1877, for an alleged forgery, and applied to be liberated on the ground that he was not guilty of any offence for which his extradition might be demanded.

The proof established that the accused had signed as President of the Second National Bank of New York eight cheques for amounts

* To appear in the Montreal Law Reports, 1 S. C.

varying from \$95,000 to \$200,000, and bearing various dates from 25th September, 1883, to 13th May, 1884. None of these cheques were given for the legitimate business of the bank, but were for the benefit of the accused, who made false entries in the books of the bank and issued "slips" and "tickets" for the bank's employees in order to conceal his defalcations. Moreover, the bank was to the knowledge of Eno in an insolvent condition when these cheques were given, and in the evening of the 13th of May, 1884, Eno's resignation as president was handed to the directors, the last of the cheques in question having been drawn by him on that day and paid before three o'clock by the bank.

In addition to this evidence the prosecution produced true copies of five indictments of the grand jury of the city and district of New York, returning true bills for forgeries in the first, second and third degrees under the laws of New York.

It was pretended by the prosecution that these indictments were admissible as evidence as "statements on oath" under the Extradition Act of 1877, sec. 9, and the opinions of Wilson, C. J., in *Regina v. Brown* (31 U. C. C. P. 500), of Dorion, C. J., in *re Worms* (22 L. C. J. 109), and of Cross, J., in *Ex parte Phelan* (6 L. N. 262), were cited in support of this pretension. On the other hand the defence cited the opinions of Galt and Osler, JJ., in *Regina v. Brown* (*sup. cit.*) and of Ramsay, J., in *re Rosenbaum* (18 L. C. J. 200).

CARON, J., held that these indictments could not be accepted as *prima facie* evidence of the commission of an extraditable offence; and that the acts proved in the present case did not constitute a forgery.

Habeas Corpus maintained.

Davidson, Q.C., and Fitzpatrick, for the prosecution.

Hon. Geo. Irvine, Q.C., Dunbar, Q.C., and Jules Tessier, for the petitioner.

COUR DE CIRCUIT.

MONTREAL, 3 Mai 1884.

Coram JETTÉ, J.

MONARQUE V. CLARKE.

*Acte des locateurs et locataires—Jurisdiction—
Bail—Résiliation—Meubles.*

Jugé—*Qu'une action pour faire annuler un bail de meubles ne peut pas être intentée en vertu de l'article 887 du Code de Procédure Civile (acte des locateurs et locataires), qui ne doit s'appliquer qu'aux immeubles.*

Le demandeur avait loué pour \$320 de meubles au défendeur; cette somme était payable mensuellement. Il demandait par son action, le paiement du loyer des mois échus et la rescision du bail, vu que le défendeur avait laissé s'écouler plusieurs mois sans payer. C'était une action intentée sous l'autorité de l'acte des locateurs et locataires.

Le défendeur, sans entrer dans le mérite de la cause, plaida par exception déclinatoire, alléguant que le tribunal, constitué pour siéger en vertu de l'acte des locateurs et locataires, n'avait pas juridiction en matière de bail de meubles, mais seulement dans les causes concernant les baux d'immeubles. A l'appui de cette prétention il cita deux cas semblables dans lesquels on avait procédé par voie de saisie-revendication. Ces deux causes sont rapportées au 5 L. C. J. p. 333, et au 4 Q. L. R. 323; de plus, il cita une autre cause où la même question avait été décidée en 1871; cette dernière est rapportée au 15 L. C. J. p. 247.

Son Honneur le juge JETTÉ maintint les prétentions du défendeur et renvoya l'action du demandeur avec dépens, sauf à ce dernier à se pourvoir devant un autre tribunal.

A. Leblanc pour le demandeur.

Calixte Lebeuf pour le défendeur.

(J. J. B.)

COUR DE CIRCUIT.

MONTREAL, 9 Juin 1884.

Coram PAPINEAU, J.

MAURICE V. DESROSIERS et LESBARD, Tiers-saisi.*

Dommages pour libelle—Saisie-arrest.

Jugé : *Qu'une somme accordée comme réparation civile d'une injure personnelle, est, de sa nature, insaisissable.*

Le demandeur, créancier du défendeur, en vertu d'un jugement, fit signifier une saisie-arrest entre les mains du tiers-saisi. Celui-ci déclara que par jugement du 30 mai 1884, la cour supérieure du district de Montréal, le condamna à payer au défendeur en cette

* Briefly noticed on p. 264.

cause, à titre de dommages-intérêts, la somme de \$50, mais que le même jour, il avait reçu signification d'un acte de transport du montant de ce jugement.

Le défendeur contesta au mérite cette saisie-arrest sur le principe que la créance saisie, résultant d'un jugement pour libelle, était, de sa nature, insaisissable et ne pouvait être traitée comme une créance ordinaire.

S'il en était autrement, ajouta le défendeur, il ne serait jamais possible d'obtenir une véritable réparation et de punir les calomnieux. Pour qu'il y ait réparation dans le véritable sens du mot, il faut que le coupable ne soit pas libre de payer à un autre qu'à la partie lésée. Sans cela, la réparation serait illusoire et le but de la loi ne serait pas atteint.

De son côté, le demandeur soutenait que la créance en question était saisissable et devait être traitée comme une créance ordinaire. Il ajouta qu'il en serait peut-être autrement si la réparation avait été accordée pour blessures corporelles, car en ce cas elle aurait pu être considérée comme tenant lieu d'aliments et n'être pas saisissable, mais il ne pouvait en être ainsi dans le cas actuel, puisqu'il s'agissait d'une somme accordée pour dommages résultant d'un libelle.

PER CURIAM. Le défendeur conteste la saisie-arrest prise en cette cause, prétendant que la créance saisie lui est due en vertu d'un jugement prononcé le 30 mai 1884, par l'honorable juge L. O. Loranger, contre le tiers-saisi, en réparation d'un libelle publié par le tiers-saisi, et que cette créance est insaisissable en loi.

Les autorités sont partagées sur cette question; les auteurs français postérieurs au code Napoléon, considèrent assez généralement les sommes accordées en réparation civile d'injures, verbales ou écrites, comme saisissables et sujettes à compensation.

Dans notre pays, il y a des jugements déclarant ces sommes sujettes à la compensation et à la saisie. D'autres, et je crois que c'est le plus grand nombre, ont déclaré qu'elles ne sont ni saisissables ni sujettes à compensation.

On trouve la même variété de décisions dans l'ancienne jurisprudence française.

Une des raisons déterminantes, à mon avis, est que dans notre législation et dans notre jurisprudence, les actions en réparation civile, ont conservé le caractère répressif et pénal qu'on leur a souvent reconnu dans l'ancienne jurisprudence française. En effet, il arrive assez généralement que les demandeurs en réparation d'injures ne font pas preuve de dommages *actuellement éprouvés et appréciés en argent*. Cependant, lorsque l'injure a été certainement de nature à causer du tort à la réputation ou à l'honneur d'un demandeur, nos tribunaux ont invariablement condamné le défendeur à payer des sommes d'argent qu'on est convenue d'appeler *dommages exemplaires*.

Bien plus, notre code civil, art. 2272, No. 4, permet la contrainte par corps contre "toute" personne sous le coup d'un jugement de "cour accordant des dommages-intérêts pour" *"injures personnelles, dans le cas où la contrainte peut être accordée."*

Par *injures personnelles*, on n'entend pas seulement les injures *corporelles* qui diminuent ou enlèvent complètement à une personne les moyens qu'elle a d'acquiescer du bien. Les injures verbales ou écrites, s'attaquant à l'honneur et à la réputation d'un homme, lui sont tout aussi personnelles que celles faites à son corps; elles lui sont généralement plus pénibles que celles-ci et le privent bien souvent des moyens de gagner sa vie.

Une créance adjugée, dans de pareilles circonstances, par un tribunal, n'a pas le caractère ordinaire; elle participe de la nature d'une créance alimentaire souvent et pénale, toujours: elle ne doit donc pas être saisissable.

Le jugement obtenu par le défendeur contre le tiers-saisi, et dont il vient d'être question, est certainement d'un caractère répressif et pénal; il n'y est fait aucune mention de dommages actuellement éprouvés. La saisie-arrest est par conséquent annulée, avec dépens contre le demandeur.

Saisie-arrest annulée.*

Théo. Bertrand, pour le demandeur.
Edmond Lareau, pour le défendeur.
(J.G.D.)

* Dans le sens du présent jugement: Chef v. Léonard & Décarv et al. tiers-saisis, Smith, J., 6 L.C.J. 305; Guyot, Rép. vol. 15, Vo. Réparation Civile, pp. 211 et 212, col. 2; Bourjon, vol. 2, p. 562, No. 41; ancien Denizart, Vo. Dommages, Nos. 17 et 18, et Vo. Réparation Civile, de No. 3 à No. 16; Pigeau, Procédure Civile, vol. 1, p. 423, dernier al. et p. 660, No. 2 (J.G.D.)

COURT OF APPEAL (ENGLAND).

June 12, 13, 1884.

Before BRETT, M.R., BOWEN, L.J., FRY, L.J.

THE BOARD OF WORKS FOR THE WANDSWORTH DISTRICT V. THE UNITED TELEPHONE COMPANY (LIMITED).

Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 96—Street vested in Local Authority—Property of in Street—Right of to Prevent Wires being Carried over Houses and across Street.

Appeal from the judgment of STEPHEN, J., at the trial without a jury.

The question raised in the action was, whether the plaintiffs, in whom a street was vested under the Metropolis Management Act, 1855, (18 & 19 Vict. c. 120), s. 96, were entitled to an injunction to prevent the defendants from carrying wires diagonally across the street at the level of the chimneys, the owners of the houses not objecting, and there being neither nuisance nor appreciable danger.

STEPHEN, J., gave judgment for the plaintiffs.

The defendants appealed.

Their LORDSHIPS allowed the appeal, holding that the principle laid down in *Coverdale v. Charlton* (48 Law J. Rep. Q. B. 128) applied; that only such a property in the street, both with regard to depth below and height above, was vested in the plaintiffs as was necessary for the ordinary user of the street as a street; and that no interference with that property had been established in this case, inasmuch as no nuisance had been created, nor was there any appreciable danger.

A JUDICIAL REMINISCENCE.

In 18— (the year is now forgotten) a shocking crime was committed in the county of Jefferson, near the Bullitt county line, being the murder of an entire family, named Joyce, and the burning of their dwelling. The family was an humble one, but highly esteemed. Of course the community was profoundly excited. A negro man living in the neighbourhood was suspected of the crime, and arrested. A confession of guilt was extracted from him. Admitting his own

guilt, he implicated three other negroes as participators in the deed, and all four were jointly indicted.

On the motion of the Attorney for the State, who represented that the party confessing was a necessary witness for the Commonwealth, a *nolle prosequi* was ordered as to him, in order to use his testimony. On the trial, he was introduced and sworn as a witness. I deemed it my duty to charge him that he was no longer in any danger of prosecution for the crime preferred against him and others; urged him to tell the whole truth uninfluenced by any confession he may have made, to retract all that was false, and took much trouble to assure him that he would be protected by the court. He was the main witness for the prosecution. He adhered to the statement he had previously made, and directly implicated the three other negroes. He further developed the fact that his confession was extorted from him by threats and the severest infliction of bodily pain.

The defence of the three who were tried consisted mainly of satisfactory, if not conclusive, evidence of an *alibi*. The jury empanelled was composed of highly respectable citizens, of more than ordinary intelligence. In the progress of the trial I felt called upon to charge the jury that the testimony of an accomplice, unless sustained by corroborating testimony, was at best entitled to but little weight, and, having been extorted in the manner detailed, was entitled to no weight whatever. This instruction was given *ex mero motu*, and in the most emphatic manner of which I was capable. It was quite apparent that the populace was deeply excited, and that the spirit of the mob was ready to burst forth. The court-room was densely packed with an infuriated people.

The case was argued at length with a spirit, on behalf of the Commonwealth, not calculated to allay the feverish and lawless temper of the crowd, and, on the part of the defence, which showed but too clearly a slavish fear of an outraged public sentiment. Seeing distinctly the portending storm, I quietly instructed the sheriff and his deputies, and also the jailer, to remove the prisoners, one at a time, as quietly as possible to the jail.

My direction was obeyed, and in such a manner as that its execution was unobserved. This order was given and executed before the argument of the case was concluded. The jury, soon after the case was submitted, as was expected, returned a verdict of "not guilty."

The fury of the mob was now fully developed. Their victims were not to be found in the Court-room, but were locked up in jail. A tumultuous rush was made to that building with a savage yell for blood. The jailer was forced by violence to surrender the keys. This occurred late in the evening and not long before dark. After nightfall, the wretched victims were taken from the jail. The man, who was really guilty, having confessed his crime and committed perjury against the others, managed to cut his throat, and the others were hung from the trees in the Court-house yard, where they remained suspended until the next morning.

When I returned to my office the next morning, the mob had not yet dispersed, but thronged the streets and Court-house yard. During the previous night, they had been guilty of the vilest excesses. The jury had been driven from their homes. My dwelling was visited with the avowed purpose of driving me, also, from home. To avoid these consequences, I was kindly urged to leave the city. This advice I refused to take. On the contrary, I felt it to be my duty to remain at home and bid defiance to the mob. The members of the bar advised that it was not prudent to hold Court in the face of the mob. This advice did not accord with my own views, and was respectfully declined. At the appointed hour, I repaired to the Court-house, walking through a dense crowd of infuriated men, and took my seat on the Bench. I directed the sheriff to open Court, and then the clerk to read the orders. During this time, there was breathless silence in the Court-room. I began the call of the docket for the day. The crisis was passed. The crowd soon dispersed. In a short time it was gone.

I have thus given a simple narrative of one of the most trying incidents of my public life.

WILLIAM F. BULLOCK.

THE LAW OF MUSHROOMS.

Those happy persons, in front of whose windows a grassy meadow smiles on these dewy mornings, and who find the pursuit of mushrooms for breakfast a delightful excuse for early rising, if only they are earlier than the poachers, will be much interested in a decision of the magisterial bench at Rugby. The accused had taken mushrooms from a field, in which salt had been sown for the

purpose of encouraging their growth, and he admitted his moral guilt by confessing the fact. The question, however, arose whether he was legally guilty. The common law did not allow a man to be convicted of larceny for taking things savouring of the realty, and things of which it may be said, if of anything, that 'the earth hath bubbles' were especially within that description. The Criminal Law Consolidation Act, however, makes it a summary offence to 'destroy or damage with intent to steal any plant growing in any garden, orchard, pleasure-ground, nursery-ground, hot-house, greenhouse or conservatory,' and also to 'destroy or damage with intent to steal any cultivated root or plant used for the food of man or beast, and growing in any land.' The case clearly did not come within the first offence, because the mushrooms were growing in a field and not in a garden; but the question was whether mushrooms growing in the field and cultivated to the extent of salt being thrown down for their benefit are 'cultivated plants' within the meaning of the section. The magistrates decided that they were not, and it would be hard to say that they are wrong. Mushrooms are clearly not 'cultivated plants' as a class, and merely throwing a little salt or a little manure on a field will not alter their character in the eye of the criminal law. If this were so, it might be criminal to pick blackberries because the owner took care of the bramble-bushes in clipping the hedge. The mode of cultivating mushrooms from spat is well known, and makes them apparent to the eye as cultivated plants, and in this form alone would mushrooms in the fields seem to come within the statute. The case, which is reserved for the opinion of the High Court, may, however, throw some light on the nature and properties of a somewhat mysterious growth. —*Law Journal (London).*

CANADA GAZETTE NOTICES.

The votes of the electors of Compton County on the Canada Temperance Act are to be taken on the 26th of November next.

The regulations for the examination of candidates for the Civil Service of India, to be held in 1885, have been filed in the department of the Secretary of State of Canada, and also in the departments of the secretaries of the different provinces.

The Canadian Pacific Railway Company is about to ask for a Superannuation Act for the benefit of their employees.

The Quebec Bank, the Maritime Bank, (St. John, N. B.), La Banque Jacques Cartier and the Central Bank of Canada announce semi-annual dividends of three per cent, and the Bank of Ottawa three and a half per cent.

The Legal News.

VOL. VII. NOVEMBER 15, 1884. No. 46.

LORD COLERIDGE ON SENTENCES.

The absurd punishments sometimes allotted by magistrates have attracted the notice and rebuke of the Lord Chief Justice of England. In charging the grand jury at Bedford Assizes on October 28, his lordship said he thought it his duty to call attention to the unreasonably severe punishment which was too commonly allotted to small offences against property. He had been often struck, sometimes shocked, at the immense length of time spent in prison, and at considerable expense to the county, by persons whose whole crime had been a petty larceny. The man who stole thirty mutton-chops had surely not caused the harm against society or the mischief of one who had made a murderous assault or secretly attempted to administer poison. On one occasion he had before him two little boys who pleaded guilty to some miserable petty larceny after a previous conviction. Seeing their tender years he inquired the nature of their previous offence, and it appeared they had stolen apples, for which the magistrates had sent them to gaol for three months with hard labour. It was just possible that these magistrates were schoolboys themselves once, and he thought it monstrous to make these boys felons for life for having done what some of the best men in the world had done, and for which they certainly deserved to have their ears boxed, but not to be sent to prison with hard labour.

THE LATE MR. FAWCETT.

The English bar probably lost an able advocate, and the bench, perhaps, a brilliant Lord Chancellor, by the accident which deprived Mr. Fawcett of sight. His career certainly affords an instructive example of a bold and resolute spirit, arrested in one path, carving out another with signal success. Mr. Fawcett was born in 1833, and as a student made good use of his eyes, for he

was seventh wrangler at Cambridge. He entered upon the study of the law at Lincoln's Inn, but in 1858, before he was called to the bar, lost the sight of both eyes by an accident which occurred while he was out shooting. The benchers of his Inn offered, it is said, to facilitate his entrance to the profession, but Mr. Fawcett, who had already developed strong literary tendencies, probably realized that he would be too seriously handicapped by his misfortune in a forensic career, and he preferred a professorship at his University. Later, although a poor and comparatively obscure man, he obtained, after several defeats, a seat in Parliament, and finally became Postmaster-General, in which capacity he introduced several valuable improvements in the service. The physical night which fell upon him did not render his understanding less luminous. Mr. Fawcett, though totally blind, never relinquished active out-of-door sports, being an untiring pedestrian, an enthusiastic angler, skater and rider, even following the hounds on the hunting field.

PRISON DISCIPLINE.

It is a little surprising to find the good people of Winnipeg so innocent as to put faith unreservedly in what their newspapers say. A hoax perpetrated by a juvenile scribe, and published by a daily journal, depicting a prison punishment with all the horrors a youthful imagination could suggest, was sufficient to excite a popular tumult, and to elicit threats of lynching the attorney-general, who was represented as actively promoting and assisting at the infliction of the torture. The kernel of fact in this sensational narrative was that a prisoner had received twelve lashes on the bare back for an attempt to escape. The punishment in itself was of no extraordinary severity, not a drop of blood was drawn, and the prisoner did not suffer from the effects of the whipping for more than a few hours; but nevertheless the serious question arises, how far the infliction of a degrading punishment is justified under the circumstances. It is in use in some Canadian penitentiaries, and it is sought to be justified, we believe, by the argument that unless such a

punishment were sanctioned, attempts to escape would be very frequent, the number of prison guards would have to be doubled, and the prisoners kept under much closer restraint. These considerations may have some force, but, on the other hand, an ignominious punishment ought not to be inflicted without grave cause. In all the well-known history of Latude's escapes from the Bastille and other French prisons he was never punished in this way. A distinction might well be drawn between an ordinary evasion and the case where the prisoner commits a murderous assault in his attempt to escape. In the former case some other kind of punishment might and should be substituted for the degrading infliction of the lash. We are not sufficiently informed as to the facts of the Winnipeg affair to judge whether it was a proper punishment or not. It had the approval and countenance of the attorney-general of the Province, but there is no mention in the accounts which we have seen, that the prisoner did more than take advantage of the negligence of his jailer, and we doubt very much whether prison rules should be permitted which make this an offence punishable by the lash.

So much for the expediency of the punishment, but as we go to press the *Manitoba Law Journal* for November comes to hand, in which the legality of the flogging is questioned. Notice of this point must be reserved until our next issue.

MASTER AND MARINER.

It must be accepted as evidence of the more tender regard of the law for the servant in the present age that an offence which formerly would hardly have excited a murmur, is now severely punished. The master of a vessel which came into the port of Montreal was proceeded against for cruelty to seamen, the charge being that he had tied some of his men up by the thumbs, their toes alone touching the ground. It appeared that the seamen had refused to execute orders, and had been tied up until they consented to obey. They had previously been placed on short allowance, the ship's provisions having run short. The men stated that they were weakened by this deprivation of food, and

unable to work. For the captain it may be said that he had put himself on the same allowance as his men, and that no injury seems to have resulted to the men from the punishment, which, moreover, it was in their own power to have terminated at any moment by consenting to return to duty. These considerations were deemed insufficient to justify the conduct of the captain. He was condemned, and the men released from their engagements. It is apparent that if a captain, from desire to economize, or other motive, half-starves his men, it is no answer that he has treated himself in the same way, and it was proved that he had opportunities to put into port for provisions. Then, again, it is quite conceivable that under certain conditions grave and permanent injury might result from the method of punishment adopted, though the injury might not be apparent at the time. These unusual forms of punishment should not be countenanced, especially where the subject has no appeal nor means of obtaining relief, as on board ship. The case resembles that of a charitable institution in Montreal, which lately attracted much notice. The children in this institution were treated to mustard plasters on various parts of their bodies. The old-fashioned methods of punishment may have their phase of brutality, but they can hardly be replaced by such devices.

A GOWN DISPUTE.

It is an extraordinary fact that a majority of the students of the law faculty of Laval University in Montreal should make the request to wear gowns while attending lectures a *casus belli* with their Alma Mater, and even submit to expulsion rather than comply with the obnoxious regulation. The gown will be the honorable distinction of these young gentlemen hereafter, while engaged in the exercise of their chosen avocation. Youth is generally impatient of delay in assuming the distinctions of manhood, rather than disposed to say of them "Sufficient unto the day is the evil thereof." The judges of the Court of Appeal at Albany recently agreed to wear gowns, from a conviction that such a costume was appropriate to high judicial officers as well as conducive to decorum in

the court room. We suppose that the same may be said of the decorum of the lecture room. Robed students will more easily remember that they are preparing for the serious battle of life. But whether gowns are suitable or unsuitable, convenient or inconvenient, the only consideration for the students was that the rule of the University made the costume imperative, and that it was their duty to submit until the rule was repealed. Resistance was puerile, and tends to excite suspicion that the gown question was a mere pretence, and that they had other grounds for severing their connection with the University. If so, it would be more manly to state their real grievance. Perhaps before this paragraph appears the students may have reconsidered their hasty determination. Let us hope so, for other universities can hardly afford, by favoring the secessionists, to encourage rebellion against lawful authority.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 21, 1884.

Coram DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

THE ST. LAWRENCE & CHICAGO FORWARDING COMPANY (deft. below), Appellant, and THE MOLSONS BANK (plff. below), Respondent.*

Bill of Lading—Assignment.

Reynolds Bros. shipped from Toledo, a port in the United States, 16,500 bushels of wheat by schooner to Kingston, Ont., the cargo to be delivered as per address in the margin of the bill of lading as follows:—"Order Reynolds Bros.; notify Crane & Baird, Montreal, P.Q. Care of St. Lawrence & Chicago Forwarding Co.," implying that, although the voyage of the schooner ended at Kingston, the cargo was to be put in charge of the Forwarding Company, destined for Montreal, Crane & Baird to be put upon their diligence by notice for any interest they might have in the cargo. The schooner having arrived

at Kingston, the Forwarding Company, the ordinary carriers for Crane & Baird, received the cargo and paid the lake freight to the master of the schooner. No new bill of lading was issued, but the agent of the Forwarding Company signed a receipt for the cargo across the face of the duplicate of the bill of lading. The respondents made advances on the original bill of lading, endorsed by the shippers, but the wheat had been previously delivered by the Forwarding Company at Montreal to the order of Crane & Baird, without the order of the shippers and without the surrender or presentation of the original bill of lading.

The question was whether the appellants, the Forwarding Company, were held to the same obligations as if they had been signers of the original bill of lading, which the respondents contended had force and effect until the cargo reached its destination in Montreal.

Held, reversing the decision of the Superior Court (5 L. N. 6; 25 L. C. J. 324), that the bill of lading was fulfilled and became effete by the delivery of the wheat at Kingston, prior to the assignment of the bill of lading to the respondents.

Girouard & McGibbon for appellants.

N. W. Trenholme, counsel.

Abbott, Tait & Abbotts for respondent.

Strachan Bethune, Q. C., counsel.

SUPERIOR COURT.

MONTREAL, Oct. 31, 1884.

Before TORRANCE, J.

HUGHES et al. v. CASSILS et al.*

Sale—Unpaid Vendor—Rescission.

The action was to annul a sale of six bales of carpets in default of payment by the vendees. The action was accompanied by a conservatory seizure. The Molsons Bank intervened and claimed that the demand should be dismissed as coming long after the sale and delivery.

The COURT, following *Greenshields v. Dubeau*, 9 Q.L.R. 353, gave judgment for the plaintiffs.

Girouard & McGibbon for the plaintiffs.

Abbott, Tait & Abbotts for the intervenor.

* To appear in the Montreal Law Reports, 1 Q. B.

* To appear in the Montreal Law Reports, 1 S. C.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, Sept. 5, 1884.

Before LORANGER, J.

HATTON V. THE MONTREAL, PORTLAND & BOSTON RAILWAY COMPANY et al.*

Company — Mandamus — Annual Meeting — Duty of President — Default — 42 Vict. (Can.) cap. 9.

The principal question in the case was as to the proper mode of compelling a railway company to call and hold their annual meeting.

The annual meeting of the railway company defendant (a company subject to the provisions of the Consolidated Railway Act, 42 Vict. [Can.], c. 9) did not take place on the day appointed therefor, in consequence of an injunction suspending the holding of such meeting. This injunction was subsequently dissolved at the instance of a shareholder (7 L. N. 85).

Held, that service of notice upon the president and secretary that the injunction had been dissolved, together with a copy of the judgment dissolving the injunction, was sufficient to put the company *en demeure* to call the meeting; and a mandamus might issue in the name of a shareholder, under C. C. P. 1022, to compel the company to call the meeting.

It was the duty of the board of directors, as soon as the injunction was dissolved, to proceed to call the said meeting, in order that the election of directors might be held, as provided by section 19 of the Consolidated Railway Act (42 Vict. [Can.], cap. 9).

The calling of the annual meeting is not a duty specially appertaining to the office of president, the Railway Act (42 Vict. cap. 9), section 19, making it the duty of "the directors" to cause such meeting to be held.

John L. Morris for petitioner.

C. A. Geoffrion, counsel.

O'Halloran & Duffy for defendants.

* To appear in the Montreal Law Reports, 1 S. C.

CIRCUIT COURT.

MONTREAL, Nov. 7, 1884.

Before MOUSSEAU, J.

SHAW V. BATTEMAN, and ROGERS, T.S., and SIDNEY, T.S.

Garnishee—Declaration—C. C. P. 619.

The *Tiers-Saisi* Rogers was condemned as the personal debtor of the defendant. The plaintiff took an attachment against him in the hands of his employer, J. G. Sidey. Sidey appeared, but declined to answer questions touching the terms of Rogers' engagement, claiming that wages not due could not be seized. Upon motion of plaintiff to make the *Tiers-Saisi* answer,

The COURT held that Sidey was bound to answer such questions, and also as to dates of payment, etc., in the terms of Article 619, C. C. P.

Kerr, Carter & Goldstein for plaintiff.

Dunlop & Lyman for J. G. Sidey.

CIRCUIT COURT.

MONTREAL, Oct. 31, 1884.

Before MATHIEU, J.

BISSENET V. GUÉRIN.

Lease of land on shares—Prohibition to sublet—Ejectment—Art. 1646, C. C.

Notwithstanding a stipulation in a lease that the lessee of land on shares shall not sublet without the consent in writing of the lessor, the tacit acquiescence of the lessor in a sub-lease is a good defence to an action of ejectment based on the fact of such sub-lease without consent of the lessor, more especially where the sub-lease was terminated before the action was brought, and the lessor had profited by the sub-lease.

PER CURIAM. "Attendu que, par acte passé, à Laprairie, devant M^{re} Defoy, notaire, le 1^{er} mars 1883, le demandeur a loué et baillé à ferme, pour l'espace de quatre années, à commencer du 29 septembre 1882, jusqu'au 29 septembre 1886, à Elzéar Demers, charretier, du village de Laprairie, un morceau de terre, situé et enclavé dans la commune de Laprairie, appartenant au gouvernement, de la contenance en totalité de vingt arpents en superficie, avec une maison, grange et autres bâties dessus construites; qu'il fut convenu,

au dit bail, que le preneur n'aurait pas le droit de souslouer le dit immeuble, circonstances et dépendances, ni aucune partie d'icelui, sans le consentement exprès et par écrit du bailleur ;

" Attendu que le dit bail a été fait à la charge par le preneur de représenter le bailleur, comme gardien de la barrière qui se trouve vis-à-vis de la maison sus-mentionnée, et d'être ponctuel à remplir les obligations auxquelles le bailleur était lui-même tenu, et à la charge par le preneur de récolter, battre, cribler et vanner tous les grains qui seraient recueillis sur le dit immeuble, pendant la durée du dit bail, et de les partager comme suit : un tiers au bailleur et deux tiers au preneur, la semence devant être fournie dans la même proportion, et pour autres charges mentionnées au dit bail ;

" Attendu que le dit Elzéar Demers est décédé le 21 avril 1884, laissant dans les lieux loués, et les occupant son épouse, la défenderesse, et ses enfants ;

" Attendu que le demandeur demande, par son action, la résiliation du dit bail, à cause du décès du dit Elzéar Demers et parce que la défenderesse, sa veuve, aurait sousloué la dite propriété à un nommé André Longtin ;

" Attendu que, vers le 27 avril dernier, peu de jours après le décès du dit Elzéar Demers, le demandeur est allé trouver la défenderesse, sa veuve, pour lui dire de semer la propriété, vu que le temps des semences était arrivé, et lui offrant de la faire aider par son fils ;

" Attendu qu'il a été prouvé que le dit demandeur avait vu le dit André Longtin travailler sur la dite propriété, et que ce dernier lui a même demandé des grains pour sa part de la semence, et que le demandeur a fourni du grain qu'il a livré au dit André Longtin ;

" Attendu qu'il résulte de la preuve que lors des semences faites sur la dite propriété, par le dit André Longtin, le dit demandeur connaissait que la défenderesse faisait semer la propriété par le dit André Longtin, et qu'il a acquiescé tacitement aux arrangements faits par la défenderesse pour faire cultiver la dite propriété ;

" Attendu qu'il a été prouvé que, lors de l'institution de l'action du demandeur, le dit André Longtin qui avait semé à moitié la partie du dit immeuble qui devait être ense-

menée, avait fini tous les travaux qu'il avait à faire sur la dite terre, en avait partagé les grains, même avec le demandeur, qui avait reçu de lui sa part ;

" Considérant que le sous bail, en supposant qu'il pût être considéré comme tel, était terminé lors de l'institution de la présente action, que le demandeur n'en avait éprouvé aucun dommage, et que d'ailleurs il est suffisamment prouvé que le demandeur a consenti à ce sous bail ;

" Considérant que le demandeur a consenti, après le décès du dit Elzéar Demers, à continuer le bail avec sa veuve, et que lors de l'institution de cette action, la défenderesse était en possession du dit immeuble, le détenant comme locataire ;

" Considérant que l'action du dit demandeur est mal fondée ;

" A renvoyé et renvoie l'action du dit demandeur, avec dépens, distraits à M^{re} E. Lareau, avocat de la dite défenderesse."

Authorities cited by the defendant : Sirey, pp. 839, 821, No. 23 ; Duvergier II. No. 90 ; Troplong, *louage*, Nos. 139, 141 ; Aubry & Rau IV. p. 492 ; C. N. Arts. 1763, 1764 ; Laurent, vol. 25, p. 259.

Robidoux & Fortin, for plaintiff

Edmond Lareau, for defendant.

POLICE COURT.

MONTREAL, November 7, 1884.

Before M. C. DENOYERS, Police Magistrate.

TUPPER v. McFADDEN.

Merchant Shipping Act, sec. 190—Ill-treatment of Seaman.

Held, 1. That the action of a captain in putting his hands on short allowance during a voyage of several months, when he had several opportunities to supply his vessel with the necessary provisions, constitutes a case of ill treatment sufficient to justify a sailor in leaving his ship and in suing for his wages under the 190th section of the Merchants Shipping Act, (1854).

2. That the captain was not justified in inflicting severe punishment on a sailor because, while the latter was weak on account of not having sufficient food to eat, he refused to work.

3. *That the refusal or neglect of the captain to provide a sailor with necessary food, and his incarceration in the ship's cells, where he was put into irons, and afterwards triced up by the thumbs, justify reasonable apprehension of danger to his life if he were to remain on board.*

Tupper was a sailor on board the *Alpheus Marshall*, a British registered ship. His engagement was made at New York, 6th September, 1883, for 3 years at \$14 a month. After a long voyage to Yokohama, Japan, the ship came into the port of Montreal. Here Tupper laid an information against the captain, accusing him of cruelty, and claiming to be discharged from his engagement and to be paid a certain sum for wages.

PME CURIAM. The information, taken under the 190th section of the Merchant's Shipping Act, alleges: That the complainant is duly articulated with the defendant to serve as a seaman on board the vessel *Alpheus Marshall*, a British registered ship; that owing to ill-treatment he has received at the hands of the defendant, he apprehends danger to his life if he remains on board said ship, and concludes, to be released from his said engagement, and paid the amount of his wages now due, viz., \$120.

The evidence establishes that on the 3rd of September last, when the said ship had been at sea since about four and a half months, on its way from Japan to Montreal, all the crew was put on short rations. Bread was reduced very near one half; meat (beef and pork) about one-third; tea and coffee about one-half; lime-juice, about five-sixths; flour, entirely suppressed. The short allowance lasted for about 40 days; all the men were weak from hunger, and one man (during the short allowance period) fainted at the wheel, apparently from weakness and want of food.

Defendant had already, on a former occasion, started on a sea voyage with insufficient provisions (deposition of Roberts, boat-swain).

On the 15th September last, when the crew had been for twelve days on short rations, as above, on a very hot day, the complainant and four others refused to turn to their duty, alleging that they were too weak to continue their work for want of

proper food. It appears that this was at a time when they had been in the habit of enjoying rest, even when they had been feeding on full allowance, and the work then to be done was not necessary for the safety of the ship. Defendant told them they would have to turn to or that they would be put in irons. Complainant, as well as the four others, said that they would submit to be put in irons, as they felt too weak to resume work, especially at a moment allotted for rest.

Defendant had them put in irons, and without notice, immediately caused them to be triced or strung up by the thumbs, until almost the whole weight of their bodies rested on their thumbs, their toes only touching the ground, and left them there, saying that they might remain in that position until their arms left their bodies, or until they would consent to turn to work. In that position they remained for fifty-two minutes, when all asked to be unstrung and said that they would go to work, which they did.

Several witnesses have sworn that they believe that Tupper was effectually too weak at that moment to go to work, having already worked all morning, and they judge of that from their own weakness and hunger. It is also proved that the vessel passed no less than six accessible ports during the period of short allowance, in which defendant could have re-provisioned his ship if he had been willing.

The *Alpheus Marshall* also met several ships but never hailed any of them. It appears really that if defendant had desired to re-provision his ship he could easily have done so.

It has been contended that Tupper and his four associates raised a mutiny against the captain. But nothing of that is proved, nor even attempted to be proved; all that these men did or said was, we are too weak to work, and immediately submitted to the disgrace of being put in irons without a movement or a remark.

I find in Maude & Pollock's *Law of Merchant Shipping*, edition of 1881, vol. 1, page 128, "Whilst his vessel is afloat, the master is bound to maintain order and discipline on board under the guidance of justice, moderation and good sense. His authority over his crew has been compared to that of a parent over his child, or of a master over his appren-

tice; these analogies, however, are not very close, and the safer rule is to consider the particular authority which the respective positions of the parties require. A master may order a delinquent mariner to be confined, or inflict corporal punishment upon him, and this authority exists not only whilst the ship is at sea, but also whilst she is in a foreign port or river. But it is only in extreme cases and where it is absolutely necessary to preserve discipline that corporal punishment should be inflicted, and it must in all cases be awarded with due moderation." Now, was this an extreme case, and was the punishment inflicted with due moderation? I believe not. Instead of having recourse to irons and tricing up his men, the captain ought to have directed his ship into some port and ought to have procured the necessary provisions to feed them properly.

Now, under all these circumstances, has there been such ill usage to the complainant on the part of the defendant as to warrant reasonable apprehension of danger to his life if he were to remain on board said vessel? I believe I am bound to answer in the affirmative. It is not necessary to bring the case under the statute that there should be immediate danger. The complainant has withstood this first experience well enough, but might fail in a second or third repetition of the same proceedings.

Judgment must go in favor of complainant. But inasmuch as the complainant could not state positively the balance due him, if the defendant can show by his books that the amount claimed is not all due, I am ready to hear him now, so as to adjust the amount of his indebtedness.

Curran & Grenier, for the prosecutor.

C. L. Gethings, for the defendants.

(J. J. B.)

POLICE COURT.

MONTREAL, Nov. 11, 1884.

Before DESNOYERS, P.M.

THE QUEEN v. JUDAH.

False Pretences—Suspension of examination.

Mr. Desnoyers, Police Magistrate, gave the following interlocutory decision in the case

of Mr. T. S. Judah, charged with obtaining the sum of \$25,000 from Mr. G. B. Burland by false pretences:—

The defendant is charged with having at Montreal, on or about the 11th day of April, 1882, by false pretences and with intent to defraud, obtained from Geo. B. Burland, in money and in valuable securities, the sum of \$25,000, the false pretences consisting in the verbal assertion made to complainant through Mr. Withers, defendant's attorney, that he (defendant) had a good title to certain real property then offered as security for the advance of the said sum, and that such real property was clear of encumbrance, and also consisting in the written assertion made by the defendant himself in the deed of obligation to complainant that the property mortgaged well and truly belonged to him, and moreover in the verbal reiteration made at the time of the passing of the deed, that he (defendant) was the sole owner of said real property; whereas in truth and in fact a portion of that real property (namely, three-eighths of the same) did not then belong to him, but belonged to his daughter, Madame Kilby. I do not intend to go over the whole case at present, but will dispose of it temporarily on the following grounds:—

It is contended by defendant that whilst the complainant presses this case against him, charging him with having represented himself as the owner of the property now under seizure, he (the complainant) at the same time contests in the civil court the right claimed by Mrs. Kilby to said property.

The complainant pretends that he does not contest Mrs. Kilby's title to the property, but simply her right to withdraw the property from seizure, she having neglected to register her title according to law for upwards of twenty years. This, I believe, is a distinction without a difference. In order to avoid all appearance of contradiction in his course, the complainant, through his counsel in the civil case, has served a notice of motion to withdraw from his contestation of Mrs. Kilby's opposition, all portion of his plea which may read as contesting Mrs. Kilby's title, resting his defence simply on Mrs. Kilby's neglect to register her title according

to law. He does not withdraw nor discontinue his seizure of the property in question. If Mrs. Kilby, through her neglect, has lost her rights, they cannot be lost for everybody. Who, then, acquired these rights if not the defendant? Or did not the defendant continue to exercise these rights, "he who was and remained the ostensible and registered proprietor and openly in possession of the property mortgaged * * * he who was and is by law the presumed legal owner thereof, and who used the complainant's money to improve the said mortgaged property," as the whole appears in and by the contestation itself. If the said contestation and the seizure be maintained, then the mortgage will be declared to have been properly given. Can it be pretended that if the seizure and consequently the mortgage be declared valid, that the defendant could be guilty of false pretences? Certainly not.

Seeing that the question now debated here is actually pending in the civil court, and using the discretion which the law confers upon me, I believe it right to withdraw and suspend the present examination until such time as the civil court shall have adjudicated in the first instance at least upon the contestation entered into between the complainant and Mrs. Kilby, and I rest my ruling upon the following decisions:—*R. v. Ashburne*, 8 C. P. 50; *R. v. Ingham*, 14 Q. B. 396.

C. P. Davidson, Q. C., for Mr. Burland.
Joseph Doutre, Q. C., for Mr. Judah.

RECENT U. S. DECISIONS.

Judgment of State Courts—Divorce—Jurisdiction.—The Federal Constitution requires full faith and credit to be given by each State to the records and proceedings of the other States; but cases wherein the court had no jurisdiction—and this fact may always be shown—are not within the Federal protection, and, there being no authority to make the record, the proceedings are not judicial.

Where a husband leaves the State in order to avoid service of legal papers upon him, and remains awhile in another State for the mere purpose of securing a divorce, and has testimony secretly taken in the State where his wife continued to reside, and he himself returns after procuring the divorce, he does

not acquire residence in the foreign State, and as the laws of one State do not pretend to divorce citizens of another State, the decree thus fraudulently obtained is without authority and does not bind the wife. *Reed v. Reed*, Sup. Ct. of Michigan, Dec. 1883—13 Amer. Law Record, 74.

Partnership—Liability of Partner—Estoppel.—A person sued as a partner, and whose name is shown to have been signed by another person to the articles of partnership, may prove that before the articles were signed, or the partnership began business, he instructed that person that he would not be a partner. A person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out. *Thomson et al. v. First National Bank of Toledo*. (Supreme Ct. of U. S. May, 1884.—13 Amer. Law Record, 129).

GENERAL NOTES.

The refusal of the students in the Faculty of Law of Laval University to obey the order of the rector, Rev. Father Hamel, in regard to the gown question and the troubles that have arisen therefrom, took a definite form yesterday morning when, at the usual hour for the Hon. Justice Jetté's lecture, Rev. Father Hamel entered, and, after referring to the nature of the troubles, asked the students directly whether they would submit to the regulations of the University or not. Only six answered in the affirmative, the majority remaining steadfast in their determination. The latter were then publicly expelled and their names struck off the list. The expelled students talk of entering the McGill law classes, and the question of opening a law faculty in connection with Victoria University is also being discussed.—*Gazette*, Nov. 11.

The Hon. L. R. Masson has been appointed Lieutenant-Governor of Quebec in the place of Mr. Robitaille whose term of office had expired. The *Montreal Gazette* makes the following reference to an incident which has caused some discussion:—"It is said that the Hon. Mr. Masson declined to take the oath which has hitherto been taken by all persons on their acceptance of the office of Lieutenant-Governor. The oath, we are bound to say, is an extraordinary one for a Lieutenant-Governor, and if this incident shall result in its being changed, it will not have been without its use. The particular phrase which, we presume, was objected to is as follows: 'And I do declare that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm.' It is quite clear that no Roman Catholic could subscribe to this oath, which is a denial of the spiritual or ecclesiastical authority of the Pope of Rome. In this country where we have formally declared the separation of church and state, where all forms of religious belief are equal in the eyes of the law, such an oath ought not to be imposed upon a Canadian official, and Mr. Masson is to be congratulated upon having refused to take it."

The Legal News.

VOL. VII. NOVEMBER 22, 1884. No. 47.

LITIGATION IN PARIS.

If we may accept the statements of an article in *Le Figaro*, the arrears of legal business in London are far exceeded by the accumulation in Paris. The writer, M. Albert Bataille, takes as an example a simple action of damages by a poor man who has been run over in the street by a *fiacre*. Two years, he says, usually elapse before a judgment is obtained from the court of first instance. Then an appeal is taken, and as the accumulation of arrears is still greater before the appellate courts than before the courts of first instance two additional years elapse before a final decision is arrived at.

From this wearisome ordeal one class of litigants is free. "Il n'y a plus guère que les procès d'acteurs et d'actrices qui se jugent vite. Qu'un cabotin de quatrième ordre fasse une esclandre à son directeur, qu'une chanteuse de café-concert soit saisie, vite on leur donne un tour de faveur, en laissant les affaires les plus considérables en souffrance." The writer suggests the organization of temporary tribunals for the disposal of arrears, to be followed up by the enactment of a clause like this: "Tout procès doit être jugé dans trois mois, à peine de forfaiture et de prise à partie des magistrats."

The other measures of relief proposed are to simplify or abolish procedure and to send petty cases before justices of the peace. As to the latter point the writer says: "J'estime enfin qu'il faudrait enlever aux tribunaux la connaissance d'une foule de causes absolument indignes d'eux. Je ne parle pas seulement de tous ces petits procès de locataires, qu'il faut renvoyer devant les juges de paix, à condition toutefois de les choisir parmi les jurisconsultes sérieux et non parmi les galopecopine d'élections. Mais les tribunaux perdent leur temps à des vétillies encore plus ridicules. A quoi croyez-vous, par exemple, que s'occupent généralement les quatre chambres correctionnelles de Paris? A juger des escrocs, des voleurs, des banquiers

véreux? Pas du tout. Les tribunaux correctionnels consacrent la majeure partie de leur journée à juger la grande querelle de Mme Chapuzot et de Mme Gibou. Mme Gibou a traité Mme Chapuzot de vieille guenon; Mme Chapuzot a riposté par une claque. Les deux commères se sont assignées mutuellement: les voilà à l'audience avec chacune douze témoins et un avocat. Les vingt-quatre témoins défilent à la barre. Les deux avocats plaident et longuement, parce que la cliente veut de l'éloquence pour son argent. Le président fait des mots, le public se tord, le tribunal renvoie les deux plaignantes dos à dos. Voilà une demi-journée perdue * * * Pourquoi encombrer le tribunal de ces querelles misérables? De grâce, renvoyez donc Mme Chapuzot et Mme Gibou devant le juge de paix de leur quartier, et ce sera encore trop d'honneur!"

We have noticed M. Bataille's effusion more as a curiosity than anything else. We have not much acquaintance with his writings, but this single article is amply sufficient to show that he belongs to the numerous class of reformers to whom reforms appear marvellously simple merely because those who propose them are so shallow that they are totally ignorant of the difficulties to be contended with. Who else would write: "Il faudrait aussi supprimer cette odieuse machine qui s'appelle la procédure civile. Il paraît qu'on s'occupe à la Chambre de modifier le Code de procédure. Il n'y a qu'un moyen de le modifier, c'est de le détruire."

PROLIXITY.

A curious case, *Hill v. Hart-Davis*, has occurred in England, in which it was held that the Court has an inherent power to punish prolixity by taking a document off the file. As prolixity is a defect not peculiar to any country the proceedings are worthy of notice. An application was made to the Court to take an affidavit of documents off the file, in that it was prolix and irrelevant. The action was brought by the trustees of the Independent Mutual Brethren Friendly Society to restrain the publication of certain statements contained in a circular issued by the defendant with reference to the affairs of the society, and

alleging that it was insolvent. The defence was that the statements were true. The defendant having obtained an order for the production of documents by the plaintiffs, they made and filed an affidavit of very great length, containing 307 sheets and 1,146 folios, for a copy of which the defendant had to pay £19 2s. Among other things the plaintiffs set out separately, by their dates and names of the writers and recipients, 4,216 letters from the secretary of the society to the agents of the different lodges, and also a very large number of receipts for sick allowances from the various lodges of the society, and also the return sheets of the expenses of the numerous lodges.

On the 24th January last, on the application of the defendant, Kay, J., ordered the affidavit to be taken off the file as being oppressive and irrelevant, and by its prolixity an abuse of the practice of the court, and ordered the plaintiffs to pay the costs occasioned by it, including the £19 2s. paid by the plaintiffs, and the costs of the application. From this order the plaintiffs appealed.

In the course of the argument it was stated that when a document is ordered to be taken off the file, the practice is not to return it to the party who has placed it there, but to destroy it by burning.

The following is a report of the argument and judgment in appeal:—

Hastings, Q.C., and Colquhoun for the appellants.—The only objection to this affidavit is its length; there is nothing scandalous in it. The court will not consider the relevancy of the documents scheduled in the affidavit on this motion. It is contrary to the practice of the court to take an affidavit off the file for prolixity, the penalty imposed being the disallowance of costs: In *Walker v. Poole*, 21 Ch. Div. 835, Kay, J., made an order similar to this, but that case is not binding on this court. If this affidavit is ordered to be taken off the file it will be destroyed and the plaintiffs will have to prepare a fresh one, which would cause delay and expense to both parties. [COTTON, L.J., referred to *Drake v. Symes*, 2 De G. F. & J. 81.]

Pearson, Q.C., and Des Graz for the defendant.—The court has an inherent jurisdiction to order any document which is vexatious or

oppressive to be taken off the file. This is a gross abuse of the practice of the court, the object being to cause unnecessary costs to the defendant. The only way the defendant could recover the costs he has been put to was to make this motion: *Taylor v. Batm*, 4 Q. B. Div. 85; *Bewicke v. Graham*, 7 Q. B. Div. 4.

COTTON, L. J.—This is an appeal from an order of Kay, J. ordering an affidavit of documents filed by the plaintiffs to be taken off the file, and that the plaintiffs should pay the costs occasioned by it. The plaintiffs have appealed from this order and they have argued that the court ought not to order the affidavit to be taken off the file, and that such a course would be contrary to the practice of the court. They contend that, if a document is alleged to be irrelevant or improper, the right order is to refer it to the taxing master, and if it is found to be so, to make the party filing it pay the costs. It is further contended that this affidavit is not irrelevant or unnecessarily prolix. In my opinion the appellants' contention cannot be maintained. It is better not to give an opinion at the present time whether the documents referred to in the affidavit are relevant, but whether they are so or not, I am of opinion that they are set out at unnecessary and improper length. They ought to have been set out in bundles and schedules, and numbered in such a way that the defendant might have asked for those which he wanted to see, specifying them by their numbers. The conclusion I have come to is, that the affidavit is unnecessarily and oppressively long. The question is, however, what order ought to be made. We are of opinion that a different order to that made by Kay, J. would be better. This would not be at variance with the principle on which he acted. I agree that, although the rules contain no provision for taking a document off the files for prolixity, yet it is the duty of the court to see that its files are not made the instruments of oppression, and that without any provisions in the rules, the court has the power, and it is its duty, to order oppressive documents to be taken off the file, even though this should result in their being burned. But in the present case the defend-

ant has got a copy of the affidavit in question, and if it is taken off the file and destroyed the plaintiffs will have to prepare another, and the defendant will have to wait while they do so. While, therefore, I quite affirm the principle on which the learned judge acted, I think it will be better to order the plaintiffs to pay to the defendant the amount of the cost, 19l. 2s. less 2l., which would have been the cost of an affidavit of proper length. The plaintiffs must pay the costs which they have been ordered to pay in the court below, and the costs of this appeal. And at no further stage of the action will the plaintiffs be allowed any costs of this affidavit. There is another point to which I wish to allude. By order LXV., r. 11, the court has power to call upon a solicitor to show cause why costs which have been improperly incurred should not be disallowed, and to order the solicitor to pay to his client any costs which may have been improperly incurred if he has been ordered to pay them to the opposite party. At present the court will make no such order in this case. This will be a matter between the plaintiffs and their own solicitor.

BOWEN, L. J.—I am of the same opinion. I think the order as modified in the way mentioned by Cotton, L. J., will meet the purposes of justice in this case without throwing doubt upon the larger jurisdiction of the court to take off its files documents which have been placed there for purposes, not of justice, but of injustice. It is not denied that the court has such jurisdiction, though it may not have been the practice of the court, since the Judicature Act, to take documents off the file merely for prolixity. Yet it is a power which could be exercised if necessary. Every court must have the power to protect its own records from being abused. I prefer not to define what constitutes oppression or vexation. It is better to determine in each case whether the circumstances are such as to come within a perfectly intelligible expression.

Fry, L. J.—I am of the same opinion. I am not inclined to express any opinion whether the documents set out in the affidavit are relevant or not. But assuming that they are, it is perfectly plain to my mind that

they might have been set out in a way which could not have been oppressive. There is a prolixity in this affidavit of which no account can be given, except a desire to cause vexation and costs to the defendant. I agree with the proposed order.

THE "MIGNONETTE" CASE.

At the Exeter Assizes, November 3, Baron Huddleston, in charging the grand jury, referred at length to the charge against Dudley and Stephens, captain and mate of the *Mignonette*, of murdering the boy Parker when at sea in an open boat. After detailing the circumstances of the case, the learned judge said:—

It seems clear that the taking away of the boy's life was carefully considered, and amounted to a case of deliberate homicide. I must tell you what I consider to be the law as applicable to this case. It is a matter that has undergone considerable discussion, and it has been said that it comes within a class of cases where the killing of another is excusable on the ground of necessity. I can find no authority for that proposition in the recognized treatises on the criminal law, and I know of no such law as the law of England. Baron Puffendorf, in his 'Law of Nature and Nations,' mentions a case (Bk. II. ch. 6, p. 205, third edition, by Kennet, A. D. 1717) where seven Englishmen, tossed in the main ocean without meat or drink, killed one of their number on whom the lot fell, and who had, as he says, the courage not to be dissatisfied, assuaging in some measure with his body their intolerable and almost famished condition, whom, when they at last came to shore, the judges absolved of the crime of murder. Although he says the men were English sailors, he does not say where the case was tried, nor of what nation were the judges. Ziegler upon Grotius, giving this relation, is of opinion that 'the men were all guilty of a great sin for conspiring against the life of one of the company, and (if it should happen) every one against his own.' I can find no reliable report of this case, and, for reasons which I shall refer to presently, I cannot consider it an authority binding on me. There is an American case, *The United States v. Holmes*, March, 1842, which is re-

ported in 1 Wallace Jun. 1, in which sailors threw passengers overboard to lighten a boat, and it was held that the sailors ought to have been thrown overboard first, unless they were required to work the boat, and that at all events the particular persons to be sacrificed ought to have been decided on by ballot, by which, I suppose, they meant by lot. I cannot subscribe to the authority of this case. Besides, it would be inapplicable to the present, because here the notion of deciding by lot was rejected. The learned American judge, in giving his reasons, said: 'That the selected should be by lot, as it would be an appeal to Providence to choose the victims.' Such a reason would seem almost to verge upon the blasphemous. I cannot but consider that the taking of human life by appealing to the doctrine of chance would really seem to increase the deliberation with which the act had been committed. That American case, however, was a charge, not of murder, but of manslaughter, on the ground of the failure, on the part of the prisoners, to discharge the statutory duty of preserving the life of a passenger. The question has been considered by the Criminal Code Bill Commissioners in their report, in which, discussing this doctrine, they say:—

'Casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculation as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one. If ever a case should occur for decision in a Court of justice, which is improbable, it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should in every case be a justification; we are equally unprepared to suggest that necessity should in no case be a defence. We judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case.'

And my brother Stephen, in his 'History of Criminal Law,' observes that this doctrine is one of the curiosities of the law, and so far as he is aware is a subject on which the

law of England is so vague that, if cases raising the question should ever occur, the judges would practically be able to lay down any rule which they considered expedient. I do not derive much assistance from either of the cases, or from the report of the Criminal Code Commissioners, and I am therefore obliged to tell you what, in my judgment, after careful consideration, I deem to be the law of England. Deliberate homicide can be justifiable or excusable only under certain well-recognized heads—cases where men are put to death by order of a legally constituted tribunal in pursuance of a legal sentence; cases where the killing is in advancement of public justice, as, for instance, criminals escaping from justice, resisting their lawful apprehension, and other such cases enumerated by Blackstone, vol. iv. 48. So also where homicide is committed for the prevention of any forcible and atrocious crime; again, where men, in the discharge of their duty to their country and in the service of their queen, kill any of the enemies of their queen and country; and, lastly, where an individual, acting in lawful defence of himself or his property, or in the reasonable apprehension of danger to his life, kills another. It is obvious that this case falls under none of these heads. The illustration found in the writers upon civil law, which is alluded to in 'Cicero de Officiis,' and mentioned by Lord Bacon in his 'Elements of the Law,' and which is quoted in some legal works as the ground of the doctrine of necessity, is placed by Blackstone under the latter head—of self-defence. He says: 'Where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned, he who thus preserves his own life at the expense of another man's is excusable from unavoidable necessity and the principle of self-defence, since their both remaining on the same weak plank is a mutual though innocent attempt upon and endangering of each other's life.' But Sir William Blackstone, in another part of the same volume, points out that under no circumstance can an innocent man be slain for the purpose of saving the life of another who is not his assailant; and he says, there-

fore, though a man be violently assaulted, and hath no possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent; but 'in such a case he is permitted to kill the assailant, for there the law of nature, and self-defence, its primary canon, have made him his own protector.' Bishop, in his 'Criminal Law,' a high American authority, supports this view, and it is the more important, as he refers to the American case to which I have before alluded. It is impossible to say that the act of Dudley and Stephens was an act of self-defence. Parker, at the bottom of the boat, was not endangering their lives by any act of his; the boat could hold them all, and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when dead, but not while living. What really imperilled their lives was not the presence of Parker, but the absence of food and drink. It could not be doubted for a moment that if Parker was possessed of a weapon of defence—say a revolver—he would have been perfectly justified in taking the life of the captain, who was on the point of killing him, which shows clearly that the act of the captain was unjustifiable. It may be said that the selection of the boy—as indeed, Dudley seems to have said—was better, because his stake in society, having no children at all, was less than theirs; but if such reasoning is to be allowed for a moment, Cicero's test is that under such circumstances of emergency the man who is to be sacrificed is to be the man who would be the least likely to do benefit to the republic, in which case Parker, as a young man, might be likely to live longer and be of more service to the republic than the others. Such reasoning must be always more ingenious than true. Nor can it be urged for a moment that the state of Parker's health, which is alleged to have been failing in consequence of his drinking the salt water, would justify it. No person is permitted, according to the law of this country, to accelerate the death of another. Besides, if once this doctrine of

necessity is to be admitted, why was Parker selected rather than any of the other three? One would have imagined that his state of health and the misery in which he was at the time would have obtained for him more consideration at their hands. However, it is idle to lose one's self in speculations of this description. I am bound to tell you that if you are satisfied that the boy's death was caused or accelerated by the act of Dudley, or Dudley and Stephens, this is a case of deliberate homicide, neither justifiable nor excusable, and the crime is murder, and you, therefore, ought to find a true bill for murder against one or both of the prisoners. You will perhaps be good enough to say whether, with reference to the mate Stephens, there is evidence which will satisfy you that he was abetting or aiding or sanctioning the conduct of Dudley. If so you will find a true bill against him. In his statutory examination on oath he says that the master (Dudley) selected Parker as being the weakest, that he agreed to this, and that the master accordingly killed the lad. Unless you disbelieve him, therefore, you will find a true bill against him as well as Dudley. I may say that Captain Dudley seems to have made no secret of what has taken place, and to have voluntarily furnished all the evidence against himself, although it is quite true that the course taken by the magistrates, very properly, in making Brooks a witness, supplies also evidence for the prosecution. The case having taken place on the high seas, and being a case of British subjects, is one which, by statute, is triable here. No person who has read the details of this painful case but must be filled with the deepest compassion for the unhappy men who were placed in this frightful position. I have only in this preliminary stage to tell you what the law is, but if you should feel yourselves bound to find the bill, I shall then take care that the matter shall be placed in a form for further consideration if it becomes necessary. I think I am bound to do this after the reports of the cases I have mentioned in Puffendorf and in the American reports, and the report of the Criminal Law Commissioners. The matter may then be carefully argued, and if there is any such

doctrine as that suggested, the prisoners will have the benefit of it. If there is not, it will enable them, under the peculiar circumstances of this melancholy case, to appeal to the mercy of the Crown, in which, by the constitution of this country (as a great lawyer points out), is vested the power of pardoning particular objects of compassion and softening the law in cases of peculiar hardship.

The grand jury eventually returned a true bill for wilful murder against Dudley and Stephens.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 19, 1884.

Coram DORION, C.J., MONK, RAMSAY, TREBHER, and CROSS, JJ.

HOGAN (deft. below), Appellant, and THE CITY OF MONTREAL (plff. below), Respondent.*

Assessment, City of Montreal—Promise of Sale.

The appellant had a promise of sale of certain real estate in the City of Montreal, at the time the annual assessment became payable (26 Sept., 1876), but did not obtain possession until some time afterwards. He had possession as proprietor during the latter half of the year for which the tax was imposed.

Held, 1. That he had not such a right in the property under the *promesse de vente*, unaccompanied by tradition, as to render him liable to assessment thereon.

2. That the assessment is indivisible, and falls entirely upon the person who is proprietor at the time the assessment becomes payable, and therefore a person who becomes proprietor after that date is liable for no portion of the assessment for the current year.

Judgment of Superior Court reversed.

Judah & Branchaud for the Appellant.

R. Roy, Q.C., and Ethier, for the Respondent.

* To appear in the Montreal Law Reports, 1 Q.B.

COUR DE REVISION.

MONTREAL, 31 oct. 1884.

Coram DOHERTY, PAPINHAU, GILL, JJ.

FILIAITRAULT v. ELIE.*

Révision quant aux frais—Enquête inutile.

Jugé :—Que lorsqu'une des parties succombe sur tous les faits qui ont fait la matière de l'enquête, quoiqu'elle puisse réussir d'ailleurs à obtenir jugement, les frais d'enquête doivent être mis à sa charge.

Pagnuelo & Lanctot pour le demandeur.

Geoffrion, Rinfret & Dorion pour le défendeur.

COUR SUPÉRIEURE.

MONTREAL, 27 oct. 1884.

Coram JETTÉ, J.

BUENSTEIN v. DAVIS.*

Dommages—Lettre privée—Communication privilégiée.

Jugé :—Qu'une lettre privée écrite à un particulier et qui lui est envoyée sans lui donner aucune publicité, est une communication privilégiée qui ne peut donner droit à une action en dommages.

L'action était renvoyée.

Abbott, Tait & Abbotts pour le demandeur.

Walker & Bowie pour le défendeur.

COUR SUPÉRIEURE.

[Sous l'Acte des Elections contestées de Québec, 1875.]

MONTREAL, 7 août 1883.

Coram LORANGER, J.

LAVOIE v. GABOURY.*

38 *Vict.* (1875), ch. 8, secs. 42 et 55—*Délai—Réponse à la pétition—Cautionnement—Contre pétition.*

Jugé : 1o. Que lorsque la loi permet de faire une procédure jusqu'à l'expiration d'un nombre donné de jours, le délai accordé doit être franc, et il n'est censé expiré que le lendemain de son échéance.

2o. Qu'un défendeur sous l'Acte des Elections contestées de Québec, section 55, peut être admis à produire une contre pétition sans donner un cautionnement ou faire un dépôt.

O. Boivert pour le pétitionnaire.

A. Lacoste, Q.C., conseil.

Trudel, Charbonneau, Trudel & Lamothe pour le défendeur.

* To appear in the Montreal Law Reports, 1 S.C.

QUEEN'S BENCH DIVISION (ENGLAND).

Before COLERIDGE, C. J., and WILLIAMS, J.

SANDERS v. TRAFF and SWAN.

Animal—Negligence—Injury caused by dog—Liability of owner, and of person in charge of dog.

The plaintiff, a laborer, was digging a hole in the garden of a house adjoining that of the defendant, T. There was a small wall, only three feet high, between these gardens. This wall belonged to the defendant, T. The plaintiff was engaged in doing some work at the bottom of the hole. Three dogs belonging to the defendant, T., had been taken out by the other defendant, S., and as the defendant S. was returning, the dogs ran through a gate into a garden adjoining the one where the plaintiff was at work. As the dogs were running about in playfulness, one of them, a large Newfoundland dog, jumped over the wall, and jumped or fell into the hole where the plaintiff was working at the time in a stooping posture. The dog fell on the nape of the plaintiff's neck, causing injuries through which he was unable to work for some time after. The defendant, T., had offered the plaintiff a couple of sovereigns as compensation, which was refused.

In an action for these injuries against the defendant T., as the owner of the dog, and against the defendant, S., as having the dogs in charge, *Held*, that, inasmuch as the dogs were not shown to be mischievous to the knowledge of the owner, the plaintiff had no cause of action against either of the defendants, either as for trespass or as for any breach of duty.

The appeal was from a decision of the Bloomsbury County Court holding that there was no evidence to go to the jury in support of the plaintiff's case.

LORD COLERIDGE, C.J. It seems to me to be clear that the learned County Court judge was quite right, and it must be manifest upon ordinary principles of common sense that he was so. An action under the circumstances of this case is quite preposterous. It was an action against a person who kept a dog, because the dog, jumping about playfully, jumped over a low wall and into a hole where the plaintiff happened to be at work. On referring to the authorities, it is manifest that such an action could not be maintained. In *Mason v. Keeling*, 1 Ld. Raym. 606, the well known case in the time of Lord Raymond and Lord Holt, it was held that an action would not lie against a man for mischief done by his dog, unless he knew that he had done mischief before, or was of a mischievous nature; and the same principle has also been laid down by Parke, B., in our own time. In *Brown v. Giles*, 1 C. & P. 118, it was held that a dog,

jumping into a field without the consent of its master, is not a trespass for which an action will lie. In *Bectwith v. Shordike*, 4 Bur., 2093, it was held that an involuntary trespass may be justified, but not a voluntary one, and though the verdict there was for the plaintiff, this arose from the jury finding that the trespass was an intentional trespass and not a mere involuntary accident. The result of all these cases is, that if a dog, going about, commits an injury or does any mischief, the owner of the dog will be liable only if the dog was of a mischievous nature and he was aware of that fact; but if there be no evidence of that, then no action will lie. Here there is no suggestion of any proof of the mischievous nature of the dog. The only thing suggested as a *scienter* is, that the owner of the dog offered the plaintiff a couple of sovereigns as a compensation; but this was entirely from his own good nature, and not because he was liable in point of law. I am of opinion, therefore, that the plaintiff has shown no cause of action, and that this appeal should be dismissed.

WILLIAMS, J. I am of the same opinion. If a man keeps horses and other animals, he is bound to keep them on his ground; and if he does not, he may be liable to an action of trespass. There is an exception to this when they are on a public highway, as they have a right to be there, and then the owner is bound to use ordinary care. But in the case of dogs, pigeons and the like, the case is different; if a dog, not being exceptionally mischievous, acting in playfulness, goes over another man's land, there is no trespass, and the owner of the dog would not be liable. Here, so far as the defendants are concerned, the occurrence was purely accidental and involuntary, and no action lies against them in respect thereof, either as for a trespass or for any breach of duty.

Appeal dismissed.

RECENT U. S. DECISIONS.

Fire Insurance—Oral Application—Conditions of Policy—Silence as to Incumbrances—Notice and proof of loss—Statement changed by agent.—Where insurance is applied for orally, and the applicant is unaware of any provision in the policy regarding incumbrances, and is not guilty of any misleading

conduct, his bare silence cannot be deemed a misrepresentation; and if the agent in such case did not read the policy to the applicant, or call his attention to the clause relating to incumbrances, the existence of a mortgage would be no impediment to a recovery from the insurance company.

When an insurance policy contains clauses requiring notice to be given, preliminary proof of loss to be furnished, and submission to an examination, in order to sue upon the policy, the insured party does not lose his right to sue, where, upon such examination being made, and the statement reduced to writing, he refuses to sign because of other statements added by the agent, and the company afterward refuse to allow him to sign, though he offers to sign the whole statement prepared by the agent. *O'Brien v. Ohio Ins. Co.* Sup. Ct. of Mich. Dec. 1883—*Amer. Law Record*, 152).

Fire Insurance — Transfer — Forfeiture.—1. The written assent of a fire insurance company to a transfer of a policy does not operate as a waiver of a prior forfeiture of the policy by a breach of one of its conditions, although the agents of the company were fully aware of the breach at the time.

2. The assent to a transfer of the policy is a mere assent to the substitution of the assignee to the rights of the assignor, and in no wise increases them. So if the assignor had no right in the policy by reason of a forfeiture at the time of the assignment, the assent to the transfer revived nothing and gave no rights to the assignee. *Ins. Co. v. Garland.* (Sup. Ct. of Ill., Jan. 1884—13 *Amer. Law Record*, 255).

GENERAL NOTES.

The admirers of 'Sir Roger,' Orton, or however he may be called (says the *Law Journal*), who may consider him a fit representative of themselves in Parliament should not be discouraged by the statement which has been made that he, like Davitt and O'Donovan Rossa, is disqualified. These gentlemen, it is true, were ticket-of-leave men, and were not allowed to sit in the House of Commons, and 'Sir Roger' is a ticket-of-leave man, but there the likeness ends. They had been convicted of felony, but he has only been convicted of perjury; and the House of Commons draws the line at felons, but admits perjurers. There is no law to prevent a ticket-of-leave man being returned to Parliament, if any constituency should take a fancy to that class of representative, and would overlook the fact that at any moment the Home Secretary may revoke the licence and consign their member to prison.

The doctrine of the English Courts first established in the *Singer Sewing Machine* case, to the effect that where a patented machine becomes known to the public by a distinctive name during the existence of the patent, any one at the expiration of the patent may make and vend such machines, and use such name, and no one, by incorporating such name into his trade

mark, can take away from the public the right of so using it, has been recently reviewed and followed by the Ohio Supreme Court Commission in *Brill v. The Singer Manuf'g Co.* (Ohio Sup. Ct. Com., June 3d, 1894), and it was held that where machines, during the time they are protected by a patent, become known and identified in the trade by their shape, external appearance or ornamentation, the patentee, after the expiration of the patent, cannot prevent others from using the same modes of identification in machines of the same kind manufactured and sold by them.—*Daily Register*.

The case of the three Greeks charged at the Thames Police Court with having in their possession certain statuary, said to be the property of the King of the Hellenes as treasure-trove, raises questions of law of some interest. The men cannot be tried in England for stealing the statues, because the English criminal courts have no jurisdiction to try a foreigner for an offence committed abroad. They cannot be sent back to Greece to be tried, for the simple reason that this country has no extradition treaty with Greece. The only offence which there is any pretence for saying that they have committed in England is that of receiving goods knowing them to have been stolen; but in the eyes of the English law the statues cannot be considered as stolen. In order to convict a man as a receiver, a theft by some one must be capable of being proved in an English court, which for the reason given is impossible. The law which governs the taking of the statuary in Greece is the law of Greece, and no such mongrel offence is known to the English law as that of receiving goods in England knowing them to have been stolen according to Greek law. The right of property in the statues stands on a different footing. If the statues were wrongfully taken in Greece they are wrongfully held in England, and the King of the Hellenes may prove his case in a civil court.—*Law Journal*.

It is announced that the Queen has been pleased to confer upon the Right Honourable Sir John Macdonald the distinction of Knight Grand Cross of the Order of the Bath, in recognition of his eminent services to Canada and the empire. The *Gazette* (Montreal) says: The occasion selected for the bestowal of this mark of great honour is most fitting, the fortieth anniversary of Sir John's entrance into public life. The dignity is an exalted one. The Order of the Bath is one of the most ancient and honourable in heraldry, and though it fell into disuse for a time in the seventeenth century, it was revived by George I in 1725, and is now the second order in rank in England, the first being the Garter. By the statutes then framed for the government of the order, it was declared that besides the sovereign, a prince of the blood, and a great master, there should be thirty-five knights. The order was exclusively a military one down to 1847, when it was placed on its present footing by the admission of civil knights, commanders and companions. The order is divided into three classes, and it is to the first of these, that of the grand cross, that Sir John Macdonald has been raised, he having previously been decorated with the second class, that of Knight Commander. The civil list of the first class is limited to twenty-five, and Sir John's promotion leaves still one vacancy in the number. Among those upon whom the honour has been conferred in recent years are such distinguished men as Lord Dufferin, Sir Edward Thornton, Sir Bartle Frere, the Earl of Lytton, Sir Stafford Northcote, Lord John Manners, Sir Robert Peel, the Marquis of Hertford, Earl Sydney, and Viscount Halifax.

The Legal News.

VOL. VII. NOVEMBER 29, 1884. No. 48.

THE LAW REPORTS.

The January parts of the series of Reports announced some time ago will be issued Dec. 6. They have been held back somewhat longer than at first proposed, partly because it was thought desirable to make the date of issue more nearly agree with the date which the numbers bear, and partly in order that some of the latest decisions of the Court of Queen's Bench sitting in appeal might be included in the first issues. We are grateful to a number of esteemed correspondents for the commendation they have bestowed upon our undertaking, and we have given due consideration to such suggestions as have been made. Of these the only one to which we need refer here was that the decisions of the City of Quebec should be included in the system. We do not think this advisable at present. A complete report of the Quebec cases would involve extra volumes and an additional staff of reporters at that city. We do not think it wise to imperil the success of the undertaking by giving it too great an extension at the outset. The Quebec cases, however, as far as they can be obtained, will be published in the *LEGAL NEWS* as heretofore.

PRISON DISCIPLINE.

The *Manitoba Law Journal*, in reference to the case recently noticed in our columns, points out that there does not appear to be any statute, order-in-council, or rule which assumes to permit the whipping of prisoners. The punishments enacted (under the authority of a local statute) for breaches of prison discipline, are (1) The hard bed; (2) Bread and water diet; (3) The dark cell, and ball and chain; (4) Chaining to the floor. Not only is corporal punishment not mentioned anywhere, but Rule 21 provides another punishment: "Prisoners attempting to escape and thereby endangering their lives will be subject, under the statutes, to a further term of imprisonment." The prisoner is,

therefore, entitled to a trial before he can be punished for an attempt to escape. This is the course adopted in this Province. Several prisoners were tried for attempt to escape at the last term of the Court of Queen's Bench in this city. On conviction, they were sentenced to an additional term of imprisonment, with forfeiture of good conduct privileges.

Apart from this absence of authority there is the question whether the local legislatures have the right to make laws awarding hard labor, flogging or other degrading punishments. This question has already been discussed at considerable length in our pages. See pp. 49, 121, 169 and 177 of this volume.

THE "MIGNONETTE" CASE.

The following is the special verdict found in the case of Thomas Dudley and Edwin Stephens, tried before Baron Huddleston, Nov. 6, at the Exeter assizes:—

'That, on July 5, 1884, the prisoners, with one Brooks, all able-bodied English seamen, and the deceased, an English boy, between seventeen and eighteen, the crew of an English yacht, were cast away in a storm in the high seas 1,600 miles from the Cape of Good Hope, and were compelled to put into an open boat; that in this boat they had no supply of water and no supply of food, except two 1 lb. tins of turnips, and for three days they had nothing else to subsist on; that on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day, when the act now in question was committed; that on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat; that they had no fresh water except such rain as they from time to time caught in their oilskin capes; that the boat was drifting on the ocean, and was probably more than 1,000 miles from land; that on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was

not consulted; that on the day before the act in question Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and, in point of fact, there was no drawing of lots; that on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy, that their lives should be saved, and Dudley proposed if no vessel was in sight by next morning, the boy should be killed; the next day, no vessel appearing, Dudley told Brooks he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. Stephens agreed to the act, but Brooks dissented from it; that the boy was then lying in the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to being killed; that Dudley, with the assent of Stephens, went to the boy, and telling him his time was come, put a knife into his throat and killed him; that the three men fed upon the boy for four days; that on the fourth day after the act the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration; that they were carried to the port of Falmouth, and committed for trial at Exeter; that if the men had not fed upon the body of the boy, they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine; that the boy, being in a much weaker condition, was likely to have died before them; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy or one of themselves, they would die of starvation; that there was no appreciable chance of saving life, except by killing some one for the others to eat; that assuming any necessity to kill any one, there was no greater necessity for killing the boy than any of the other three men; but whether, upon the whole matter, the prisoners were and are guilty of murder, the jury are ignorant, and

refer to the Court.' The prisoners were then liberated on bail, themselves in 100*l.*, and one surety for each in a like amount, to appear at the assizes for Cornwall next after a decision of the Queen's Bench, if that Court consider the crime of murder has been committed. The record will be drawn up, and the Crown will apply for a writ of *certiorari* to remove it into the Queen's Bench Division, when it will be argued as a Crown motion.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 19, 1884.

Before DORION, C.J., MONK, TESSIER, CROSS and BABY, JJ.

GAUDIN (plff. below), Appellant, and ETHIER (def. below), Respondent.*

Tithe—Right of curé—Purchaser of threshed grain.

Held, confirming the judgment of Chagnon, J., (6 Legal News, 165), that the tithe is due by the person who has harvested the grain, and not by him who has merely threshed and fanned it.

2. That the privilege of the *curé* for tithes on the crop subject thereto exists so long as it remains in the possession of the person who has harvested it, but ceases when the grain has passed into the hands of a third party in good faith for valid consideration.

Pagnuelo, Taillon & Lanctot for Appellant.
Paradis & Chassé for Respondent.

COUR DE REVISION.

MONTREAL, 31 mai 1884.

Coram SICOTTE, PAPINEAU, JETTÉ, JJ.

MORANDAT v. VARET.*

Capias—Déclaration—Exception à la forme—Délai.

Jugé : Que les délais pour faire une exception à la forme à un bref de *capias* et aux procédés faits sur icelui devaient compter seulement du jour du rapport fixé dans le bref, et non pas du jour où le bref avait été rapporté au greffe sur un ordre du juge.

* To appear in the Montreal Law Reports, 1 Q.B.

2. Que même dans le cas où le demandeur a déjà pris une saisie-arrêt avant jugement accompagnée d'une déclaration, le *capias* émané dans la même cause, pour les mêmes raisons, doit aussi être accompagné d'une déclaration.

C. A. Vilbon, pour le demandeur.

C. Lebeuf, pour le défendeur.

COUR DE REVISION.

MONTREAL, 27 oct. 1884.

Coram TORRANCE, DOHERTY, PAPINEAU, JJ.

*LECLAIRE et al. v. FOREST.**

Composition et décharge—Caution solidaire.

Jugé: Que dans le cas de composition et décharge entre un débiteur et ses créanciers, lorsque l'acte a lieu non pas à raison de l'intention des créanciers de donner au débiteur le montant de ses créances, mais parce qu'ils ne peuvent pas avoir plus, la dette naturelle continuant à exister, la caution solidaire n'est pas déchargée.

T. & C. C. De Lorimier, pour le demandeur.

Mercier, Beausoleil & Martineau, pour la défenderesse.

COUR SUPÉRIEURE.

MONTREAL, 5 nov. 1884.

Coram MATHIEU, J.

*TURGEON v. LA CITÉ DE MONTREAL.**

Changement de niveau d'une rue — Responsabilité—Dommages.

Jugé: Qu'une corporation municipale est responsable du dommage qu'elle cause à un propriétaire sur une rue dont elle change le niveau.

De Martigny & De Martigny, pour le demandeur.

R. Roy, C.R., pour la défenderesse.

COUR SUPÉRIEURE.

MONTREAL, 10 nov., 1884.

Coram LORANGER, J.

*CAYONNETTE v. GIRARD.**

Acte des Licenses de 1878—Action sous les sections 95 et suivantes.

Jugé, 1. Que la désignation du défendeur

comme hôtelier dans le bref de sommation, est suffisante aux termes du par. 4 de la 1ère sect. de l'acte des licenses de 1878.

2. Que la section 95 du dit acte s'applique non seulement aux personnes licenciées pour la vente des boissons enivrantes, mais aussi à celles qui en vendent habituellement sans licence.

3. Que l'action autorisée par les sections 96, 97 et 98 du dit acte est une action en indemnité d'un caractère purement civil, et est soumise aux règles ordinaires de la procédure.

4. Que cette action peut être indistinctement soumise à la cour ou à un jury, aux choix des parties.

5. Que le demandeur doit alléguer et prouver que le défendeur savait, au moment de la vente, que la personne à laquelle il avait vendu était la personne désignée dans l'avis qu'il a reçu.

Pelletier & Cie. pour le demandeur.

Mercier, Beausoleil & Martineau pour le défendeur.

COUR DE CIRCUIT.

MONTREAL, 8 sept. 1884.

Coram LORANGER, J.

OUMET v. GRAVEL.

Lettre d'avocat.

Jugé: Que dans l'espèce, le coût de la lettre d'avocat n'est pas exigible et ne peut être recouvert en justice du débiteur à qui elle a été écrite pour lui demander le paiement de sa dette.

Par sa déclaration le demandeur allègue entre autres choses:

Que le défendeur lui est endetté de la somme d'une piastre et demie, pour le coût d'une lettre d'avocat qu'il aurait fait écrire au défendeur, son débiteur, par l'entremise de ses procureurs et avocats, messieurs Oumet, Cornellier & Lajoie.

Que le défendeur s'est reconnu le débiteur du demandeur en payant la dette réclamée par la dite lettre, mais qu'il a refusé de solder le montant dû au dit demandeur pour honorer sur la dite lettre.

Que pour se soustraire au paiement de la dite lettre, le dit défendeur a usé de fraude et de dol envers le commis du demandeur en

* To appear in the Montreal Law Reports, 1 S. C.

lui représentant qu'il y avait une convention entre le dit demandeur et le dit défendeur par laquelle ce dernier ne devait rien payer pour la dite lettre.

Que par ses fausses représentations le défendeur aurait réussi à obtenir du commis du demandeur une quittance finale de tout compte, tant pour la dette que pour les frais, et que la dite quittance est nulle et comme non avenue. Et pour ces raisons, le demandeur conclut à ce que le défendeur soit condamné à lui payer la dite somme d'une piastre et demie avec intérêt et dépens.

A l'encontre de cette action le défendeur a produit la défense suivante :

Que le demandeur n'a pas le droit de recouvrer en justice du défendeur le coût de la lettre qu'il allègue lui avoir fait écrire par ses avocats.

Qu'aucun article du tarif des avocats, ne leur accorde d'honoraire pour le coût des lettres ou avis qu'ils envoient aux débiteurs de leurs clients. Et il concluait, pour ces raisons, au renvoi de l'action.

Le demandeur ne fit aucune preuve de ses allégations ; mais il fut admis que la lettre en question avait été envoyée au défendeur, et entendu entre les parties que la question pure et simple de savoir si le coût de la lettre d'avocat pouvait être réclamé en justice, serait soumise au tribunal.

Lors de l'audition, le demandeur a cité au soutien de ses prétentions les jugements de cette cour rendus dans les causes suivantes :

Héroux v. Clément, 10 R. L. 589 ; *Lamarre v. Auger*, 6 L. N. 8 ; *Michaels v. Plimsoll*, 27 L.C.J. 29 ; 3 L. N. pp. 25 et 37.

PER CURIAM. Les décisions ont varié sur cette question, et il est arrivé parfois que l'équité a fait fléchir la rigueur de la loi. Cela a eu lieu dans les cas où il y avait la preuve de rapports entre le débiteur qui avait reçu la lettre et l'avocat qui l'avait écrite, et que les services de ce dernier avaient été mis à contribution de quelque manière. Mais si le débiteur paie son créancier après avoir reçu la lettre sans s'être en aucune façon mis en rapport avec l'avocat, ce dernier est sans recours contre lui ; il n'y a eu là qu'un service gratuit quant au débiteur et il ne s'est établi aucun lien de droit entre eux. Dans l'espèce, c'est le créancier qui

réclame la valeur de la lettre écrite par son avocat ; la même règle s'applique ; comme l'intérêt est le mobile de toutes les actions, on doit présumer que ce créancier a trouvé le sien, dans les ménagements dont il a usé envers son débiteur.

J'ai conféré avec quelques-uns des honorables juges qui ont rendu les jugements que l'on a cités à l'audience, et je suis autorisé à dire que les rapports de quelques-unes de ces causes ne sont pas en tous points exacts. Chaque cause présentait un état de fait particulier qui a fait prévaloir la raison d'équité.

Action renvoyée.

Ouimet, Cornellier & Lajoie, pour le demandeur.
Robidoux & Fortin, pour le défendeur.

(J.G.D.)

COUR DE CIRCUIT.

MONTRÉAL, 3 NOV. 1884.

Coram MOUSSEAU, J.

MÉTHOT V. JACQUES.

Locateur et locataire—Action en expulsion.

- Jugé : 1o. *Que le fait de convertir un hangar en écurie, ne constitue pas une infraction au bail, alors même qu'il y est stipulé qu'il ne sera pas permis au locataire "de faire aucun changement, démolition ou amélioration" dans les lieux loués, sans le consentement "expres de la bailleuse."*
- 2o. *Que le fait d'avoir, en dépit de cette clause du bail, converti un hangar en écurie, ne constitue pas un changement de destination, mais ne fait qu'apporter une modification dans le mode d'occupation du dit hangar.*
- 3o. *Que la conversion du dit hangar en écurie, ne peut, dans l'espèce actuelle, donner lieu à la résiliation du bail, ce changement ne causant aucun préjudice à la demanderesse, et le défendeur étant tenu de remettre à la fin de sa jouissance les lieux dans le même état qu'ils étaient lorsqu'il en a pris possession.*

La demanderesse poursuit le défendeur en expulsion et au soutien de sa demande allègue :

Qu'outre l'obligation légale de faire servir les lieux loués aux fins pour lesquelles ils étaient destinés, il fut spécialement stipulé au bail par elle invoqué, "que le défendeur ne "ferait aucun changement, ou amélioration

"dans les lieux loués, sans sa permission expresse et par écrit."

Que contrairement à cette stipulation, et à la loi, le défendeur aurait converti en écurie le hangar à lui loué, y aurait fait divers changements et détériorations et gardé un cheval sans sa permission, employant ainsi le dit hangar pour des fins contraires à la destination pour laquelle il lui avait été loué.

Qu'en contravention au dit bail, il avait de plus embarrassé la cour de la maison à lui louée par la demanderesse, en y laissant ses voitures, et ce, au grand inconvénient des autres locataires qui s'en seraient plaints. Et elle concluait à la résiliation du bail et à l'expulsion du défendeur.

A l'encontre de cette action le défendeur a produit le plaidoyer suivant :

Qu'il est vrai que le défendeur occupe les lieux décrits en la déclaration en vertu du bail allégué en icelle, mais ce, en bon père de famille, suivant l'usage et conformément à la destination des lieux loués ; et que loin de les avoir détériorés, il les a au contraire améliorés.

Que le mode et la manière dont le défendeur a joui des dits lieux, sont en tout point conformes aux stipulations du dit bail, de même qu'à la loi et aux coutumes et usages suivis parmi nous.

Que la demanderesse n'a pas d'intérêt, ni de juste raison, pour demander la résiliation du dit bail et que sa poursuite est purement malicieuse et vexatoire.

Que les changements faits par le défendeur au dit hangar, l'ont été pour lui permettre de jouir des lieux loués avec plus d'avantages pour lui-même et sans dommages pour la demanderesse, et n'ont fait qu'assurer davantage de sa part l'exécution pleine et entière du dit bail.

Que les améliorations faites par le défendeur, l'ont été au vu et su de la demanderesse, sans aucune objection de sa part, et ce, longtemps avant l'institution de la présente action.

Qu'entre autres obligations, le défendeur est tenu par la loi de remettre à l'expiration du bail les lieux loués, dans le même et semblable état qu'il les a reçus, chose qu'il ne manquera pas de faire ; et que partant l'action de la demanderesse est pour le moins prématurée. Et il en demandait le renvoi avec dépens.

Au soutien de ses prétentions le défendeur a cité les autorités suivantes :— Troplong, Louage, édition belge, Nos. 175, 306, 310, 311, 313 ; Agnel, Code manuel des propriétaires et locataires, Nos. 166, 334 ; Lepage, Lois des bâtiments, 2e partie, p. 186 ; Sirey, C. N. art. 1729, Nos. 15, 16, 17, 18, 19, 20, 21.

La Cour prit la cause en délibéré et après mûr examen de la question, donna raison au défendeur, et débouta la demanderesse de sa demande avec dépens.

Action renvoyée.

Z. Renaud, pour la demanderesse.

Augé & Lafortune, pour le défendeur.

(J.G.D.)

POLICE COURT.

MONTREAL, NOV. 18, 1884.

Before Mr. DENNOYERS, P.M.

THE QUEEN v. JUDAH.

False Pretences.

The following remarks were made by the Police Magistrate in committing the defendant for trial before the Court of Queen's Bench :—

The defendant is charged with having at Montreal, on or about the 11th day of April, 1882, by false pretences and with intent to defraud, obtained from George B. Burland, Esq., in money and in valuable securities, the sum of \$25,000, the false pretences consisting in the verbal assertion made to complainant, through Mr. Withers, defendant's attorney, that he (defendant) had a good title to certain real property then offered as security for the advance of the said sum, and that such real property was clear of incumbrance ; and also consisting in the written assertion made by the defendant himself in the deed of obligation to complainant that the property mortgaged well and truly belonged to him, and moreover in the verbal reiteration made at the time of the passing of the deed that he (defendant) was the sole owner of said real property ; whereas in truth and in fact a portion of that real property (namely, three-eighths of the same) did not then belong to him, but belonged to his daughter, Madame Kilby.

As to the first part of the false pretences alleged, Mr. Withers, who acted as agent for

defendant, swears that he cannot remember the specific words used by the defendant to him as to his title, but he (Withers) thoroughly understood from the defendant that his title was perfect and clear of encumbrance. As to the second part of the false pretences alleged, Mr. Lighthall, notary, produces the original deed of obligation containing the assertion stated above, and says moreover that at the time of signing the obligation the defendant affirmed verbally that the property was his by good title.

As to the falsity of the assertion or pretence of the defendant that his title was good, and that the property, that is all the property, belonged to him, there cannot be any doubt. The property mortgaged was acquired during the community of property which has existed between the defendant and his late wife, and by the death of the latter *intestate*, as it was believed until recently, her children inherited her share. I will not dwell on this point, because it is so clear that the defendant's counsel themselves did not pretend to deny Mrs. Kilby's (Miss Judah's) title to a share of the property. In fact, the Superior Court of Montreal has already confirmed Mrs. Kilby's title to the three-eighths of property seized.

Was Mr. Burland's parting with his money and securities the result of the false pretences? I believe it was. There were other considerations in his mind. The opinion given to him by his notary, Mr. Lighthall, as to the validity of defendant's title no doubt was the principal one. The high position and character enjoyed by the defendant, and other considerations may have had their weight. But had Mr. Burland known that the defendant only owned five-eighths of that property, and had not Mr. Withers stated to him that defendant's title was perfect, that is perfect to the whole property, I am sure that Mr. Burland would not have parted with his money; he swears that himself positively, and it stands to reason that he would not.

Now, was the defendant animated with the intent to defraud when he obtained Mr. Burland's money? This is the delicate point in the case. It appears that in the year 1886, the firm of the late Sir George Cartier advised the Masson estate to advance a sum of money

to the defendant on a property possessed by him in the same conditions as that now in question.

It appears also that in 1874 another eminent Queen's counsel of this city gave it as his opinion that defendant's title to a property possessed by him in similar conditions was good. From this it is claimed that the defendant was acting in good faith. We have no evidence whether the defendant ever disclosed to the firm of Sir Geo. Cartier, or the other eminent Queen's counsel, the facts as they were. Perhaps he never mentioned to these gentlemen any more than he did to Mr. Lighthall that the property offered as security had been acquired during the existence of his community of property, and that his wife was since deceased. Anyone examining defendant's title, his deed of purchase, the registrar's certificate, would come to the conclusion that the defendant was the owner, unless he were informed that since the purchase and the registration of the deed the position of the owner had been altered by the death of his wife. Such death does not appear at the registry office, and judging from the deed and registrar's certificate only, certainly the defendant would appear to be the only and real owner of the property. I admit that a careful examiner of titles would act wisely in ascertaining the status of the borrower; in fact, should enquire whether he is a married man or a widower, but if he forgets to do so, does the omission justify the applicant to affirm a fact which is not correct, viz., that he is proprietor of the whole estate whilst he is only part proprietor? Here the defendant is a lawyer of long experience, and it seems to me unreasonable—injurious in fact to his intelligence—to suppose that he did not know he had been married under the *régime* of community of property. But granted for a moment that he ignored it, or had lost sight of it, he was reminded thereof in two different circumstances at least. On the 1st of February, 1879, the defendant himself obtained a loan from the estate Masson, and in order to obtain that loan, his daughter (Mrs. Kilby) had to intervene in the deed of obligation, and in her quality as being the only surviving child issue of the marriage of the

said defendant with his deceased wife, Dame Elizabeth Schoyer, had to renounce to all the rights which she might have upon the thereby hypothecated lots of land, one of which had been acquired by defendant during his said marriage. Furthermore, he was advised by Mr. Cramp, advocate, about one year before obtaining the loan from Mr. Burland, that a community of property had existed between him and his late wife; and thereupon he gave in his own handwriting the name of Mrs. Kilby as the sole representative of his late wife and of his late son Alfred, to the Sun Insurance Company, from whom Mrs. Kilby was then obtaining a loan.

Now, at the last hour, it turns out that the late Mrs. Judah had made her will in due form of law before a notary, by which she bequeathed the usufruct and enjoyment of all her property to her husband, the defendant, during his lifetime, and after his death the usufruct and enjoyment of the same to her children during their lifetime, and after their death the right of property to her grandchildren. This will, which was made in the defendant's own office, seems to have been entirely ignored since, never was registered, and only came to light recently, having been filed in this cause by the complainant.

Its dispositions may explain perhaps why it has been left so long in oblivion. One thing is certain, however, if it had been disclosed to Mr. Burland, this gentleman would never have parted with his money, not even with Mrs. Kilby's intervention, because by the will it appears that she is not proprietor at all.

The case of *Rex v. Codrington* decided in England in the year 1825 has been cited as a precedent governing the present case. In that case it was held "that where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it with the usual covenant for title, the prisoner could not be convicted for obtaining money by false pretences." There may have existed some circumstances to justify this decision, which do not appear in the report, but I must say that as it is, it seems to be rather a peculiar one. At all events it has been over-ruled,

rightly I believe, in several more recent cases and particularly in the case of *Reg. v. Meakin*, reported in 11 Cox, p. 270. And if it had not been over-ruled I should certainly not take it upon myself, as examining magistrate, to be guided by that ruling. I readily admit that a mere defect in a deed or in a title, or an exaggeration of the value of real property could not bring the mortgages under the operation of the statute concerning false pretences. The recent decision of the Court of Queen's Bench, Montreal, in the case of *Reg. v. Brien dit Durocher* upheld that view. But here there is no question of defective title or exaggeration of value, there is an absolute want of title. The defendant says: I own that property, meaning all that property, whilst in truth he only owns five-eighths, and on that assertion he obtains the money. Is that not obtaining by false pretences? And if there could be a doubt whether this amounts to false pretences, there remains the following section of the consolidated statutes of Lower Canada, cap. 37, which cannot be got over: "114. Whoever pretends to hypothecate any real estate to which he has no legal title, shall be guilty of a misdemeanor, and being convicted, shall be imprisoned for a period not exceeding twelve months, and to a fine not exceeding one hundred dollars, and the proof of the ownership of the real estate shall rest with the person so pretending to hypothecate the same."

The strongest contention of the defendant's counsel at the argument was that whilst the complainant presses this charge of false pretences against the defendant, he at the same time contests in the civil court the right of Mrs. Kilby to the property seized, showing thereby inconsistency on his part. If Mr. Burland is right in his pretension in the civil court that the mortgage and the seizure are good, then he cannot claim that there were false pretences used.

I adopted this view to a certain extent and suspended my examination until such time as the civil court would have decided the question in the first instance. There was nothing new in this, a similar course had been followed by magistrates before, though not very frequently, both in England and in

Canada. I thought this was a fair and mild way of dealing out justice to the interested parties in this case, but it appears that the defendant did not so appreciate it, but manifested his displeasure by inspiring the public press to severely comment upon my decision. As I have no other motive than that of doing my duty, seeing that both parties are desirous that this case should proceed upon its merits at once, I have changed my determination and now proceed to dispose finally of the case.

Under all the circumstances related above I do not see how, as examining magistrate, I could take upon myself to absolve the defendant, how much soever I should have been pleased to do it. It is to be regretted that a newspaper in this city should have thought proper to publish such indelicate and malevolent remarks as were made in relation to this case whilst it is *sub judice*.

A fair criticism is allowed and always accepted with pleasure; but such strictures as the ones published can only have the effect of being painful to one who feels that he has conscientiously done his duty.

Davidson, Q.C., for the prosecution.

Doutre, Q.C., for the defendant.

CANADA GAZETTE NOTICES.

J. S. Ewart, S. C. Biggs, H. M. Howell, and J. A. M. Aikins, barristers, of Winnipeg, M., have been appointed Queen's Counsel. J. M. Hamilton, district judge of the provisional judicial district of Thunder Bay, O., has been appointed a local judge of the High Court of Justice for Ontario.

RECENT UNITED STATES DECISIONS.

Banks and Banking — Notes — Deposits — Special Deposits — Bills and Notes — Indorsers — Evidence.—Where a bank is the holder of a note payable at the banking-house, and upon maturity, the maker has a deposit in excess of the amount of the note, which deposit is not specially applicable to a particular purpose, the bank is bound to apply a part of said deposit to meet the note, and cannot elect to let the note go to protest and hold the indorser. Where such a course is taken the indorser is discharged from liability.

Where such a course was taken by a bank

and the cashier of which was maker of the note in question, evidence was inadmissible in an action by the Bank against the indorser to show that the cashier had agreed in his official capacity that the indorser should not be bound, and further, in case the said agreement was unauthorized, to show that the bank was fully protected against loss by reason of stock owned therein by the cashier and by his official bond.—*Commercial National Bank v. Henninger*, (Supreme Court of Pennsylvania, March, 1884. 13 American Com. Record, 273.)

Fire Insurance—Void Policy—Change of Title of Insured Partnership Property.—Where one of the provisions of an insurance policy given to a partnership is that "If the title of the property is transferred, incumbered or changed, . . . the policy shall be void," a dissolution of the partnership, and a sale by one partner to the other of his interest, is a change of title to the property, and will render the policy void. *Hathaway v. State Ins. Co.*, (Supreme Court of Iowa, July 1884. 13 Amer. Law Record, 290.)

GENERAL NOTES.

The *Law Journal* (London) has the following reference to the special verdict in the "*Mignonette*" case (p. 381):—

The course pursued by Baron Huddleston in the *Mignonette* case of directing the jury to find a special verdict, instead of directing them to find a verdict of guilty and reserving the point of law, has some important consequences. The indictment and special verdict will now be brought up by *certiorari*, and will be argued before a Divisional Court of the Queen's Bench Division. This may consist of all the judges of that Division, but judges of other Divisions may not sit as they may on the Court for the consideration of Crown Cases Reserved, which includes all the judges of the High Court. In the case of the *Franconia*, it will be remembered. Sir Robert Phillimore, the Admiralty judge, took part in hearing the appeal. On the other hand, there will be an appeal from the judgment of the Divisional Court on the special verdict to the Court of Appeal, and thence to the House of Lords. By the Judicature Act, 1873, s. 19, any judgment or order of the High Court may be appealed from 'save as hereinafter mentioned.' The only case at all like the present to which the exception can apply is that dealt with in section 47, which provides that 'no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error in law apparent on the record.' The saving was probably intended to maintain the practice of appealing, as in *O'Connell's Case*, on writs of error; but the words are wide enough to include the present case. The special verdict is necessarily entered on the record, together with the judgment of the Divisional Court upon it; and if the judgment be wrong with reference to the special verdict, there will be 'error in law apparent on the record.' There is, we believe, no instance in modern times of a special verdict, and it is only since the Judicature Acts that such verdicts can be carried to the House of Lords, which thus may for the first time in its history have the opportunity of laying down a definition of murder.

The Legal News.

VOL. VII. DECEMBER 6, 1884. No. 49.

BREACH OF PROMISE.

The £10,000 sterling allowed to the plaintiff in the action against Lord Garmoyle (*Finney v. Cairns*, otherwise *Garmoyle*) is said to be probably the largest amount of damages ever recorded in England in an action for breach of promise of marriage. The *Law Journal* says:—"The nearest approach to it is £3,500, given in 1835 to a solicitor's daughter for the loss of the alliance of a solicitor who had inherited a considerable fortune from his father (*Wood v. Hurd*, 2 Bing. N. C. 166). In 1866 the sum of £2,500 was awarded to a milliner's daughter as compensation for losing a husband in the shape of a young gentleman with £700 a year (*Berry v. Da Costa*, 35 Law J. Rep. C. P. 191), but there were circumstances in the case tending to make the damages exemplary. In former times apparently it was more common for disappointed husbands to bring actions than now, and in the reign of William and Mary £400 was awarded for the loss of a lady worth £6,000 (*Harrison v. Cage*, Carth. 467)—the largest sum, we believe, awarded by unsympathetic jurymen to a male plaintiff. No doubt as large, and perhaps larger, sums than the present have been paid out of court, but we now have an assessment, agreed upon by all concerned and sanctioned by a jury, of a countess's coronet at £10,000."

PRIVILEGE OF THE CROWN.

In *Exchange Bank* and *The Queen*, claimant, Mr. Justice Mathieu has held that the Crown has no preference for its deposits or advances over other depositors in the distribution of the assets of a bank in liquidation. The claim of the Crown appeared to be supported by Art. 611 of the Code of Procedure, which states that "in the absence of any special privilege, the Crown has a preference over chirographic creditors, for sums due to it by the defendant." The learned judge inclines to the opinion, however, that this article, which was

inserted in the code at the last moment, does not affect the old law, which restricted the privilege of the Crown to claims against *comptables*, or persons accountable for Crown dues. See also *Campbell v. Judah*, 7 L. N. 147. A correspondent has favored us with a reference to an English case not yet reported in any of the law journals, but mentioned in the *Illustrated London News*, of November 15, 1884. In this case it was held in Chancery, in the liquidation of the Oriental Bank, that the colonies of Mauritius, Victoria, &c., possessed the Crown privilege, so that their monies in the bank when it suspended must be paid to them, by the liquidators, out of the assets, by privilege.

MISCONDUCT OF JURY.

A case decided recently by the Supreme Court of California (*People v. Lyle*, 4 West Coast Reporter, 348), shows that trifling irregularities will not be permitted to affect a verdict. The Court held that jurors are presumed to do their duty in accordance with the oath they have taken, and that presumption is not overcome by proof of the mere fact that, during a trial which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer, under circumstances which rendered the act of invitation necessary, and of a supper at the hotel of his associate counsel under like circumstances. Such acts, it was remarked, however improper or indiscreet, could not, in themselves, have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment; and they will not warrant a court in setting aside a verdict of conviction. To warrant setting aside a verdict, and granting a new trial for irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct, the verdict will not be disturbed.

THE LAW REPORTS FOR JANUARY.

The first instalments of the new system of reports in connection with the *Legal News* are now issued, and comprise 96 pages, viz., 48 of the Queen's Bench series, and 48 of the Superior Court series. The number of pages contained in the monthly parts, it may be observed, will probably be somewhat above the average during the winter months, and under the average during the long vacation, when the difficulties of securing revision of proofs by the judges are greater. The January issues being sent by the publishers to all the present subscribers of the *Legal News*, it is unnecessary to refer specially to the contents. The February issues are in an advanced stage of preparation, and it is the intention of the publishers to place the monthly parts in the hands of subscribers promptly and regularly.

NOTES OF CASES.**COURT OF QUEEN'S BENCH.**

MONTREAL, Nov. 19, 1884.

Before DORION, C.J., MONK, RAMSAY, TESSIER and CROSS, JJ.

SIPLING (plff. below), Appellant, and THE SPARHAM FIREPROOF ROOFING Co. (deft. below), Respondent.*

Qui tam action—27 & 28 Vict., cap. 43—*Affidavit*.

Held, that in the affidavit required by 27 & 28 Vict., cap. 43, the cause of action must be indicated sufficiently to identify the action sworn to with that actually prosecuted as specified in the declaration.

Judgment confirmed.

Archibald & McCormick for Appellant.

Robertson, Ritchie & Fleet for Respondent.
J. R. Gibb, counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 19, 1884.

Before DORION, C.J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

RIBED (plff. below), Appellant, and THE SPARHAM FIREPROOF ROOFING Co. (deft. below), Respondent.*

* To appear in the *Montreal Law Reports*, 1 Q. B.

Qui tam action—27 & 28 Vict., cap. 43—*Affidavit*.

Held, that a reference in the affidavit required by 27 & 28 Vict., cap. 43, to the action mentioned in the præcipe "herewith filed," is not a sufficient identification of the action sworn to with that actually prosecuted as specified in the declaration.

Judgment confirmed.

Archibald & McCormick for Appellant.

Robertson, Ritchie & Fleet for Respondent.
J. R. Gibb, counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 24, 1884.

Before DORION, C.J., MONK, RAMSAY, TESSIER and BABY, JJ.

LA CORPORATION DU VILLAGE DU BASSIN DE CHAMBLÉ (deft. below), Appellant, and SCHEFFER (plff. below), Respondent.*

Municipal Law—Collection Roll—M. C. 955.

Held, 1. That the formalities prescribed by the Municipal Code with reference to a collection roll must be strictly followed, as in the case of an *acte de répartition* annexed to a *procès-verbal*, and where such formalities have not been observed the taxes thereby imposed are not exigible, and a sale of land for arrears of such pretended taxes will be annulled.

2. Where the taxes are illegal, in consequence of there being no valid assessment roll in existence, acquiescence will not give validity to such assessment.

Judgment confirmed.

Lacoste, Globensky, Biscaillon & Brosseau for Appellant.

Prefontaine & Lafontaine for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, March 27, 1884.

Before DORION, C.J., MONK, RAMSAY, CROSS and BABY, JJ.

THE EXCHANGE BANK OF CANADA v. CRAIG et ux.*

Procedure—Inscription for Enquête.

Held, that it is not competent to any party in a cause to inscribe for the adduction of

* To appear in the *Montreal Law Reports*, 1 Q. B.

evidence at length, without the consent of all the parties.

Seem, that any party may insist upon proceeding at *enquête* and merits at the same time.

Macmaster, Hutchinson & Weir for plaintiff.
L. H. Davidson for defendant.

COUR SUPÉRIEURE.

St. JEAN (Dist. d'Iberville), 19 nov. 1884.

Coram CHAGNON, J.

BOURBOIS v. PIÉDALUE, et BOUCHER et al., opposants, et THE GRAND TRUNK RAILWAY COMPANY et al., créanciers colloqués, et BOUCHER et al., contestants.

Cession de biens—C.P.C. 799.

JUGÉ : 10. *Que la cession de biens, autorisée par l'article 799 du Code de Procédure, peut être faite à des tiers non-intéressés, pour le bénéfice et dans l'intérêt commun des créanciers.*

20. *Que les devoirs des fidéi-commissaires en rapport avec telle cession, consistaient à conserver et administrer les biens cédés, dans l'intérêt général des créanciers.*

30. *Que, comme partie de ces devoirs relatifs à la conservation et administration des biens cédés, les fidéi-commissaires ainsi nommés pouvaient et devaient faire connaître aux créanciers de l'insolvable, le fait de l'existence de la dite cession, inventorier les biens ainsi cédés, appeler les créanciers à se faire connaître eux-mêmes, en produisant entre leurs mains leurs réclamations, aux fins de constater les forces de la succession, et convoquer les créanciers en assemblée dans la rue de leur soumettre l'état des affaires de l'insolvable, et de se faire aviser par eux et à propos de telle administration.*

40. *Que l'exercice de ces devoirs de la part des dits fidéi-commissaires, constituait une sage administration des biens cédés, dans l'intérêt commun des créanciers.*

50. *Que, quoique les dits fidéi-commissaires n'aient pas pu dans l'espèce, liquider eux-mêmes les biens cédés, tant à raison du défaut d'un concours unanime des créanciers pour cette fin, que de l'état actuel de la législation concernant la liquidation des biens des débiteurs insolubles, ils n'en avaient pas moins, en vertu des principes généraux de droit, un privilège sur le produit de la*

vente faite par autorité de justice, des biens cédés, et ce par préférence aux créanciers tout au moins chirographaires de l'insolvable, pour les avances et déboursés par eux faits dans l'exercice de leur fidéi-commis, et aussi pour leur indemnité personnelle attachée à la conservation, administration et gérance qu'ils ont eues des biens cédés dans l'intérêt commun des créanciers.

60. *Que le mérite de l'opposition des opposants et de la créance par eux réclamée dans et par leur opposition, n'ayant été contestée par aucun créancier, le protonotaire était tenu de mettre à l'ordre la créance réclamée par les opposants en la traitant comme une créance privilégiée; sauf le droit des créanciers, après que telle créance aurait été ainsi mise à l'ordre, d'en contester la légitimité et le mérite, de la manière pourvue par la loi.*

The question was whether the assignees of the estate—Messrs. O. N. E. Boucher and O. Hébert—should be paid for their services as such in preference to all other creditors.

CHAGNON, J., was of opinion that the assignees worked for the benefit of the creditors in general, having given notice of their quality, received the accounts of said creditors, made a detailed inventory and statement of the estate, submitted their inventory to the creditors in assembly, who had discussed the same, and who finally had appointed a committee to look further into matters. The creditors had thus benefitted by the work of the assignees, and had virtually accepted them as their mandataries.

Voluntary assignment, as the one made by Piédalue & Bourdeau to the assignees, was recognized by law under Art. 799 of the Code of Civil Procedure, and is a mandate which the insolvents were forced to give if they wished to avoid the issuing against them of a writ of *Capias*.

The assignees had not, perhaps, been able to liquidate the estate, but this was owing to the want of legislation on the point, and what they did was nevertheless within the limits of the functions conferred upon them by law. The lack of success of the assignees was not their fault, but the creditors' who had not all joined in to liquidate the estate ont of court.

The object which the assignees had in view was to liquidate the estate without going to law, and their lack of success cannot be ascribed to their bad management, success or lack of success of an undertaking by a mandatary or assignee depending more upon the wisdom there is in contracting such undertaking than on the final result of the same, or the profits derived therefrom by the mandator. If the assignees had not succeeded through their own fault or their bad management, then they could not recover for their services in such undertaking.

The assignees in this case had acted prudently and wisely, and their services which partake of expenses made for the benefit of the mass of the creditors, must be paid. The assignees had a privilege for their fees, as well under Art. 1723, Civil Code, as under Art. 1994, of same code, and therefore they must be collocated as such for their services.

Authorities cited: Art. 799, C.P.C.; Ravaut, Procédure Civile du Palais, pp. 738, 740; Pothier, Ed. Bugnet, vol. 10, pp. 334, 335, 337, 339, 293, 294; Guyot, Vo. abandonnement; Pardessus, Droit commercial, vol. 4, pp. 633, 636; Marcadé, vol. 8, pp. 492, 493, 622, 633, 635; Troplong, Traité du mandat, pp. 247, 589; Dalloz, Vo. mandat, No. 149; Dalloz, Vo. privilège, Nos. 34 et suivants; Art. 1994, C.C.; Marcadé, vol. 10, p. 49; Tansey & Bethune, Cour d'appel, Legal News, vol. 7, p. 134; Ravaut, Pro. C. du Palais, p. 278; Pigeau, vol. 1, pp. 681, 809; Troplong, Traité des privilèges et hypothèques, pp. 58, 59, No. 58; pp. 168, 169, No. 122; pp. 170, 171, 182, No. 131; pp. 183, 268; Art. 1722, C.C.; art. 1723, C.C.; art. 1713, C.C.

A. D. Girard, for Assignees, Contestants.

E. Z. Paradis and J. P. Carreau for Creditors.
(O.N.E.B.)

SUPREME COURT OF CANADA.

June, 1884.

BADENACH V. SLATER.

Trust deed for benefit of creditors—Power to sell on credit not a fraudulent preference.

In a deed of assignment for the benefit of creditors the following clause was inserted: "And it is hereby declared and agreed that the party of the third party, his heirs, etc.,

shall, as soon as conveniently may, collect and get in all outstanding credits, etc., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." B., an execution creditor of the assignors, attacked the validity of the assignment.

Held, affirming the judgment of the Court below, that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O., cap. 118.*

STRONG, J. At the argument I had some doubt upon the point raised by this appeal, which subsequent consideration has, however, entirely removed. *Pickstock v. Lyster*, 3 M. & S. 371, having shown that an assignment for the benefit of creditors generally was not avoided by the 13 Elizabeth, but was good against a particular execution creditor of the assignor, I think it must necessarily follow that every power or trust conferred upon the trustee for creditors which is for their benefit must also be valid. I cannot agree that a clause which invests such a trustee with a discretionary power which so far from being necessarily prejudicial to the general body of creditors, is actually essential to their protection, renders the assignment invalid merely because it "hinders and delays" them. It is to be presumed that the trustee will do his duty; in other words that he will execute the trust in the interest of the creditors exclusively, and that he will not sell on credit unless it is for their benefit that he should do so. If he fails in his duty or proposes to act in contravention, his conduct can be controlled by a Court of Equity, who can also supersede him in the office of trustee. Supposing there are but a small body of creditors, and that the assignment is made to them directly without the intervention of any trustee, the

* The observations of the judges in this appeal from Ontario, being of considerable interest at the present time, we take the annexed report from the *Law Journal* (Toronto).

property being admittedly less in value than the debts there should be no reservation of an ulterior trust for the assignor, could it be said that such a clause as this conferring on them a power to do what they like with their own was void? Then what difference does it make that a trustee is interposed, and a resulting trust declared for the debtor? To the amount of the debts the goods are still the property of the creditors who, through their trustees, have the control and management of them for their own behoof. Then to say that the trustee may or may not in his discretion sell on credit, is but to say that he shall dispose of the property in the way most advantageous for the whole body of creditors.

The truth is that every argument adduced in support of the contention that such a clause as this necessarily makes an assignment fraudulent, strikes at the doctrine of *Pickstock v. Lyster*, for so soon as it is once admitted that a particular creditor may lawfully be hindered or delayed by an assignment for the whole body of creditors, it necessarily follows that every reasonable and useful power for the protection of the whole body of creditors must also be valid. Whilst I thus hold as to the effect of such a clause as this in the abstract, I do not of course mean to say that a clause authorising a sale on credit may not, coupled with other circumstances, lead to an inference of fraud which would invalidate the deed of assignment. All I mean to determine is that by itself such a provision is not illegal. I am of opinion that this is the law under 13 Elizabeth, and that we need not seek the aid of the Provincial statute to enable us to reach such a decision. I am of opinion that the appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J., stated that as no case of fraud or collusion had been made out, he was of opinion that the appeal should be dismissed with costs.

GWYNNE, J.—I concur in the opinion that this appeal should be dismissed. The clause at the end of the second sec. of chap. 118 of the Revised Statutes of Ontario appears to me to have the effect of giving statutory recognition to a doctrine already well esta-

blished by the decisions of the courts, viz., that a deed of assignment made by a debtor for the purpose of paying and satisfying rateably and proportionably, and without preference or priority, all the creditors of such debtor their just debts, shall not be construed to be a deed made either to defeat or delay the creditors of such debtor, or to give one of such creditors a preference over another, unless then there be something on the face of the deed which is assailed here as being void against creditors which, *ex necessitate rei*, has the effect of raising a presumption *juris et de jure* that the intention of the debtors in executing the deed was to defeat or delay their creditors in the sense in which such an act is prohibited by the statute, for there is no suggestion that the deed gives to any creditor a preference over another. The question of intent was one of pure fact to be passed upon by the jury who tried the issue, and the proper way of submitting that question to them would be to say that if they should find the intent of the debtors in executing the deed was for the purpose of paying and satisfying rateably and proportionably and without preference or priority all the creditors of the defendants their just debts, they should find that it was not made with the fraudulent intent which is prohibited, and that they should render their verdict for the plaintiff. The words of the deed as affects the selling on credit, in short substance, are that the trustee shall, as soon as conveniently may be, collect and get in all sums of money due to the debtors, and sell the real and personal property assigned by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents, such object, as expressed in another part of the deed, being to pay and divide the proceeds among all the creditors of the grantors rateably and proportionably according to the amount of their respective claims. This language, as it appears to me, merely expresses an intention that the trustee may, at his discretion, sell for cash or on credit, accordingly as he shall deem best calculated in the interest of the creditors to realise the largest amount for

general distribution among them rateably and proportionably according to the amount of their respective claims.

To hold that this clause in the deed operates so as to compel the court to hold, as an incontrovertible conclusion of law, that the deed was not made and executed as in its terms it professed to be, for the purpose of paying and satisfying rateably and proportionably all the creditors of the debtors their just debts, but was made and executed with intent to defeat and delay such creditors, appears to me to involve a manifest perversion of the plain language of the deed, and such a construction of the clause in question is not warranted by any decision in the English courts or in those of the Province of Ontario, from which this appeal comes, and there is in my judgment nothing in it which so recommends it as to justify us in making a precedent by its adoption. If it be said that the clause in question, although not operating as such a conclusion of law, at least affords evidence of the deed having been executed with an intent to defeat and delay creditors, and not for the purpose of paying and satisfying the creditors their just debts rateably and proportionably, and for that reason was proper to have been submitted to the jury to be taken into consideration by them, the answer is that such a point should have been made at the trial, and not for the first time, as it was here, in the Court of Appeal for Ontario in the argument of the counsel for the appellant in his reply. And as the jury have rendered a verdict for the plaintiff, they must on this appeal be taken to have found, as matter of fact, that the deed was not executed with intent to defeat and delay creditors, but was executed for the purpose of paying and satisfying them their just debts rateably and proportionably.

Unless there be something on the face of the deed which in law nullifies and avoids it, the verdict of the jury in maintaining its validity must be upheld. Upon this appeal nothing, as it appears to me, is open to the appellant to contend, but the points contained in his motion in the Common Pleas Division of the High Court of Justice for Ontario for a rule for a non-suit or judgment to be entered for the defendant. The judg-

ment of this court refusing such rule, sustained by the Court of Appeal for Ontario, is what is before us, and I am of opinion that the verdict of the jury should be upheld, and that the rule moved for was properly refused.

I have, however, carefully perused the judgments in the case of *Nicholson v. Leavitt*, so much relied upon by the counsel for the appellant, as it was decided by the Court of Appeals for the State of New York, as reported in 6 N. Y. R. 10, and also the same case as decided in the Superior Court of the State, and reported in 4 Sandf. 254. The Court of Appeals, when reversing the judgment of the Superior Court, seem to me to rest their judgment in a great degree upon a proposition which they lay down, to the effect that a debtor might with equal justice prescribe any period of credit which to him should seem fit, as that which the trustee should give upon sales of property assigned to him, as assume to vest in him a discretion to sell upon credit if such a mode of selling should seem reasonable and proper and in the best interests of the creditors.

With the utmost respect for the high authority of the Court of Appeals for the State of New York, this seems to me to be equivalent to saying that to express an intent of vesting in the trustee authority and permission to exercise his best judgment by selling on credit, if such mode of disposing of the property should seem to be in the interest of the creditors whose trustee he is made, and to express an intent of divesting such trustee of all such authority, and to prescribe to him a rigid, unalterable course which, in the discharge of his trust, he must pursue against the dictates of his own judgment, and against the will of the creditors whose trustee he is made, are one and the same thing. There are other parts of the reasoning upon which this judgment is rested which seem to me to lead to the conclusion, that delaying a creditor in obtaining satisfaction of his debt by the particular process of execution in a suit at law is equally a defeating and delaying of him within the prohibition of the statute as the vesting the trustee with authority in his discretion to sell upon credit, if such would be a reasonable and proper course to pursue in the interest of the creditors, and

that the former is not within the prohibition of the statute is established in our courts beyond all controversy.

Upon the whole, therefore, after a careful perusal of both judgments, I must say that that of the Superior Court is, in my opinion, based upon much sounder reasoning, and is more reconcilable with the English authorities than is that of the Court of Appeals, and I think it a sound rule to lay down as governing all cases like the present that an assignment of property by an insolvent debtor can never be declared void under the statute in question here, if in the opinion of the tribunal for determining matters of fact in each case, the actual intent of the debtor, as a matter of fact, in executing the deed was, as the jury must be taken to have found that fact in this case, to provide for the payment and satisfaction of the creditors of the debtor rateably and proportionably without preference or priority according to the amount of their respective claims; and, in my opinion, the mere fact that the deed contains a clause authorising the trustee in his discretion to sell the property assigned or any part of it, on credit, if such a mode of selling it should seem reasonable or proper and in the interest of the creditors, does not justify as a conclusion of law an adjudication that the grantor's intent in executing the deed was not to provide for such payment, but on the contrary, in violation of the provisions of the statute in that behalf, was to defeat and delay his creditors.

THE CASE OF MR. BUNTIN.

On p. 228 we gave the observations of Mr. Dugas, Police Magistrate, when committing Mr. Buntin for trial. The Grand Jury having found a true bill, the trial took place during the November Term of the Court of Queen's Bench, and the defendant was convicted. There being no Case Reserved, and the motion in arrest of judgment being overruled, Mr. Justice Monk (Dec. 2) passed sentence as follows:—

Mr. Buntin,—It is useless for me to attempt, nor do I wish, to disguise from you my regret that it now becomes my duty to pronounce upon you the sentence of the law in pursuance of the verdict finding you guilty

of the charge brought against you. The accusation was that you, in concurrence with Mr. Craig, president of the Exchange bank, yourself being then a director of the bank, secured and received an undue preference over other creditors to the extent of \$8,000. You were a large creditor of the bank, and the amount thus withdrawn was only a part of the deposit then standing at your credit. At this time the bank had suspended payment and was in a state of insolvency. In thus acting you become involved in the commission of an illegal act. Upon this point the statute is clear and precise, and the facts proved were undeniable and in truth could not be denied. You were ably defended and you had a fair trial. The verdict of the jury was sustained in law by the rulings of the court, and the result was and is that you stand convicted of having violated the law, and thereby you have subjected yourself to the penalties of a misdemeanour. For this offence the statute inflicts a sentence of imprisonment in jail for any period less than two years, at the discretion of the court. It may be proper to remark that you, being a man of wealth, returned the money with interest so soon as you became convinced that you had committed an illegal act. The creditors of the bank did not lose one dollar by this undue preference. But in the opinion of the jury the law had been transgressed; no compromise was proved, and, in law, was not possible. There are, however, many circumstances attending your case which incline the court to exercise the utmost leniency compatible with a reasonable application and a rather mild vindication of the law. Had it been in my power to impose only a fine possibly I might have considered myself justified in doing so. It may perhaps be thought that your case is one of considerable hardship, but even so the sentence of the law is inevitable; and, on the other hand, it will probably occur to you that you acted with great rashness and want of reflection in doing what you did. I do not deem it necessary to add another word except to say that after a careful consideration of all the incidents of your particular case as disclosed by the evidence, the court would rather err on the side of clemency than on that of harsh-

ness. Your sentence is that you be imprisoned in the common jail of this district for a period of ten days.

W. H. Kerr, Q.C., and Hon. A. Lacoste, Q.C., for the prosecution.

J. J. Curran, Q.C., and C. A. Geoffrion for the defence.

S. Bethune, Q.C., counsel.

THE CASE OF MR. JUDAH.

In this case (see p. 371) a true bill was found, and the defendant was tried before the Court of Queen's Bench, Monk, J., presiding. On Dec. 2 the jury being still unable to agree after being locked up the previous night, were discharged.

C. P. Davidson, Q.C., and J. A. Ouimet, Q.C., for the Crown.

Joseph Doutre, Q.C., and D. Macmaster, Q.C., for the defence.

GENERAL NOTES.

APPROPRIATION OF MONEY FOUND.—Ellen Moody, a hawker, was charged on demand at the Thames Police Court on Tuesday, with stealing a purse containing about \$2. It was alleged that the woman found the purse; but the evidence was not satisfactory, and the magistrate discharged the prisoner. In doing so, he observed that there was a good deal of misapprehension respecting the finding of property. "If," he said, "a person found anything and appropriated it to his or her own use, knowing who the owner was, that person would be guilty of theft; but if a person found, say a purse, in which there was nothing to show to whom it belonged, there was no obligation to find out the owner; and no theft would be committed if the finder appropriated the money."—*Washington Law Reporter*.

An English lawyer's right to his fee seems to rest on a very intangible basis. A case is reported in which a barrister gave up all his regular practice to devote himself to a particular case, and after years of devoted labour succeeded in winning it. His client, being a woman, utterly ignored him as soon as she had the estate in enjoyment. He thereupon brought suit (see *Kennedy v. Brown*, 32 L. J. C. P., 137), for his fee, amounting to \$100,000. But the judges would not allow him any standing in court. They enlarged on the value of an advocate's services to his client; but held that his remuneration must be a gratuity—an *honorary*, for which no suit could in any case be brought. The plaintiff was utterly ruined, having abandoned all his other practice with the particular case, and died shortly afterwards broken-hearted.—*Ky. L. Rep.*

CONTRIBUTORY NEGLIGENCE.—In the recent case of the "*Vera Cruz*," in the English Admiralty Court (41 L. T. Rep. N. S. 26), which was an action to recover damages for personal injuries, the plaintiff contended

that contributory negligence on his part did not prevent him from recovering, provided he could show that the defendant, by the exercise of due care, might have prevented the accident, notwithstanding his negligence. This position the court refused to sustain. After citing several cases mentioned by the plaintiff, the court said: "What those cases really decide is that, although there may have been negligence on the part of the plaintiff, yet unless he, the plaintiff, might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his wrong (cf. the judgment of Parke, B., in *Davis v. Mann*). This doctrine, it will be seen, is a different thing from that for which the plaintiff is here contending."—*Daily Law Record (Boston)*.

MEASURE OF DAMAGES.—In the case of *King v. Watson*, the Texas Court of Appeals decided that, where a contract is broken, the measure of damages in respect of such breach is the amount which would arise under circumstances that may reasonably be held to have been in the contemplation of both parties at the time of making the contract. In the case in question, A made a contract to thresh B's grain, and told him he would thresh it on July 4th. B prepared his grain. A failed to thresh it, and the grain remained exposed until September. The Court held that B could not recover the amount of the deterioration of the grain from exposure, as neither party at the time of contract could reasonably be supposed to have contemplated such exposure. It was further decided in the same case that, where the plaintiff's petition shows a case entitling him to nominal damages, but joins a claim for substantial damages, which is not tenable, it is not error to sustain a demurrer to the whole petition.—*Law Record (Boston)*.

THE CASE OF MR. JUDAH.—A correspondent of the *Gazette*, referring to the observations of Mr. Denoyers (*ante*, p. 371), says:—"The cases cited by him to justify the hanging up of this case until the civil action is concluded, are hardly in point. They are cases where there was no doubt about the offence charged being a crime, one of them, if I mistake not, being a charge of perjury. In this case, according to all the authorities, there was no crime. The English case cited by Mr. Macmaster in his argument was very clear upon that point, and no attempt was made to meet it. But there is another case nearer home. Some years ago the firm of Owen McGarvey & Co. purchased some property to which the vendor, it turned out, had no proper title. A criminal action was taken for false pretences, and the matter came before the Court of Queen's Bench, Mr. Justice Ramsay, whose ability as a criminal lawyer everybody admits, presiding. The moment the facts of the case were stated by the learned Queen's counsel who had charge of it for the prosecutors, the judge at once, on the ground that a breach of contract or covenant, arising out of a defect in title to land, could not be made a crime, ordered a verdict of acquittal, which the jury rendered without leaving the box, and the accused was at once dismissed. The deed in that case was made by Trefle Brien dit Deroche to the firm of Owen McGarvey & Co., passed by Alphonse Clovis Decary, notary."

The Legal News.

VOL. VII. DECEMBER 13, 1884. No. 50.

BUSINESS IN APPEAL.

The November Term began at Montreal on the 15th ult. with 80 cases inscribed. This was a decrease of 36 cases as compared with the November Term of 1883. The additional Terms of last winter account for the difference. Judgment was pronounced during the Term in 23 cases; the judgment of the court below was affirmed in 18 cases, reversed in 4 and reformed in 1 case. Eighteen cases were heard during the term, nine of which (the Provincial Tax cases) were argued together. We give elsewhere a *résumé* of each day's proceedings, which, we think, will be of interest, both to town and country readers, and often facilitate search as to the fate of particular cases.

THE BEST MODE OF EXECUTING CRIMINALS.

The *Lancet* says:—"At length it is beginning to be recognised in France that the brain of a decapitated criminal lives, and consciousness is maintained, for an appreciable time, which to the victim may seem an age, after death—an opinion we strongly expressed many years ago. This ghastly fact, as we have no doubt it is, being perceived, it is beginning to be felt that executions cannot any longer be carried out by the guillotine. Prussic acid is now proposed. If instantaneous death be desired, this is clearly inadmissible. The period taken to terminate life by poison of any kind must needs vary greatly with the individual. In not a small proportion of instances we fancy death by prussic acid would be considerably protracted, and, although long dying is not so horrible as living after death—so to say—yet it is strongly opposed to the interests of humanity to protract the agony of a fellow creature dying by the hand of justice. Electricity is another agent suggested. We doubt the possibility of applying this agent so as to destroy life instantly. We confess that, looking at the matter all round, we incline to think that

hanging, when properly performed, destroys consciousness more rapidly, and prevents its return more effectually, than any other mode of death which justice can employ. It is against the bungling way of hanging we protest, not against the method of executing. That is, on the whole, the best, we are convinced."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, NOV. 26, 1884.

Before DORION, C. J., RAMSAY, TESSIER, CROSS and BABY, JJ.

DORION (def. below), Appellant, and DORION (plaintiff below), Respondent.*

Procedure—Account.

Where a defendant, in an action asking for an account of his administration of real estate under a special agreement, pleads, first, that he has never been put in default to render an account, and has always been ready to account, and files an account with his pleas, and further pleads that he owes nothing under the alleged agreement, *held*, that the account accompanying his plea will not be rejected on motion as irregular and prematurely filed.

2. An account rendered in such case should not be rejected on motion, on the ground that the chapter of disbursements contains items having no apparent connection with the administration of the property, this being a question to be determined only on a *débat de compte*.

Judgment reversed.

Dalbec & Madore for the Appellant.

Geoffrion, Counsel.

Pagnuelo & Lanctot for the Respondent.

SUPERIOR COURT.

MONTREAL, NOV. 28, 1884.

Before LORANGER, J.

LOVEJOY V. CAMPBELL, and THE PROTESTANT BOARD OF SCHOOL COMMISSIONERS, T.S.*

Salary of School-teacher — 38 *Vic.*, cap. 13—*Public employee*—C. C. P. 628.

The defendant was a teacher in the em-

*To appear in Montreal Law Reports.

ploy of the Protestant Board of School Commissioners of Montreal. His salary being seized under a judgment, he claimed exemption under 628 C. C. P.

Held, that the provisions of 38 Vic., Cap. 12, which subject a portion of the salaries of public employees to seizure, do not apply to the salary of school teachers under the control of the Boards of School Commissioners, and that under C. C. P. 628 their salary is exempt from seizure.

Kerr, Carter & Goldstein for the plaintiff.

Downie & Lanctot for the defendant.

COUR DE REVISION.

QUEBEC, 30 oct. 1884.

Coram STUART, CARON et BOURGEOIS, JJ.

SENECAL V. CHOQUETTE.

Procédure—Faits et Articles—Prove.

Le présent jugement de la Cour de Révision, infirme un jugement de la Cour Supérieure de Montmagny, par lequel le défendeur avait été condamné à payer au demandeur la somme de \$50 de dommages pour injures verbales. Le demandeur réclamait \$12,000 par son action.

Le jugement de la Cour de Révision est très explicite par lui-même, et nous le donnons en entier :

" La Cour, etc.

" Considérant que le dit demandeur en vertu d'un ordre valide, a été, le 14 janvier dernier, dument assigné à répondre le quinzième jour de février alors prochain et maintenant dernier, à certains interrogatoires sur faits et articles annexés au dit ordre ;

" Considérant que le dit demandeur dument assigné n'a pas répondu aux dits interrogatoires le dit jour, quinze février dernier, ni depuis ;

" Considérant que le dit demandeur n'a jamais offert de répondre aux dits interrogatoires sur paiement de ses frais de déplacement ;

" Considérant que les interrogatoires numéros cinquième et sixième annexés aux dit ordre, étaient pertinents à la contestation mue entre le défendeur et le demandeur ;

" Considérant qu'il résulte de la preuve faite par les parties en cette cause que le dit défendeur n'a pas proféré sur le compte du

demandeur les accusations mentionnées en la déclaration, que les paroles dont le défendeur s'est servi en parlant du demandeur ne comportait aucune imputation directe de malhonnêteté, et que le défendeur n'a causé aucun dommage au demandeur ;

" Infirme le jugement rendu le quatrième jour de juillet dernier contre le dit défendeur en faveur du demandeur par la Cour Supérieure siégeant dans et pour le District de Montmagny, et rendant le jugement que la dite Cour aurait dû rendre, déclare avérés les faits articulés dans les dits interrogatoires numéros cinq et six, et renvoie l'action du dit demandeur avec dépens de la Cour Supérieure et les dépens de la Révision en faveur du défendeur.

J. G. Bossé pour le demandeur.

P. Aug. Choquette pour lui-même.

(P.A.C.)

SUPERIOR COURT.

SHERBROOKE, Feb. 26, 1884.

Before BROOKS, J.

McFARLANE V. McNEECE.

Capias—Intent to defraud.

Held, that where a debtor who in 1875 had secreted his property and left Canada with intent to defraud, came temporarily into the Province in 1882, and was capiased as he was again leaving, that the secretion and departure in 1875 coupled with intention of again leaving in 1882, were sufficient ground for the arrest ; and the capias was declared good.

PER CURIAM. The defendant was arrested under a capias in November 1882. The affidavit alleges that in 1875 defendant secreted his property and absconded and has since resided in a foreign country, is now temporarily in Quebec, about to leave for England.

Defendant petitions against this and alleges the allegations of the affidavit to be untrue.

Defendant, a physician, was residing and practicing in Bury ; after the rendering of judgment in favor of plaintiff, defendant sold at auction all his moveables and left Bury. It is shown that he was indebted to various parties, and that his movables must have sold for considerable ; one witness states he paid his debts as far as he was able from the

proceeds, but can give no details; he was owing plaintiff but paid him nothing.

Defendant then left and apparently was employed as surgeon on the Allan Line between Liverpool and Quebec, and afterwards between Liverpool and Africa and Liverpool and New York.

In November 1882, plaintiff finds him in Quebec on the point of leaving for Liverpool and arrested him. Was he justified in so doing? After leaving Bury it would appear that the defendant married again and had his domicile in England, he certainly divested himself of all his property in this country, perhaps paying some of his creditors to the detriment of others; this was a legal fraud, and plaintiff might then have arrested him.

Having failed to do so, is plaintiff now, when he finds him, after long absence in foreign countries, within the jurisdiction of this Court, debarred from so doing?

The case of *McKenzie & Shaw*, was when a merchant was going and had been in the habit of going to Europe and returning to his domicile here. In *Hurtubise v. Bourret* it was not alleged where the debt was contracted (23 L. C. J. 130). In the cases of *Henderson v. Duggan*, and *Paulet v. Autaya*, the circumstances disproved any fraudulent intent.

Defendant certainly did in law secrete his property, for he sold all he had without applying any of the proceeds to pay plaintiff. He left the country for many years, residing in foreign parts, and making no attempt to pay his debts, he never communicated with his creditors, though he was in constant employment as a professional man, presumably getting adequate remuneration.

What is intent to defraud? In this case he had for years kept out of the jurisdiction of our courts, and was again leaving when arrested.

When he left Bury he did so under extremely suspicious circumstances; it is shown that he meditated how to get away without paying his debts, prevaricating, and in the end insulting his creditor.

I think he was, even under the strict interpretation which some of our Judges place upon the law of *capias*, liable to arrest.

H. B. Brown for plaintiff.

J. W. Merry for defendant.

COURT OF APPEAL REGISTER.

MONTREAL, NOV. 15.

Bury & Samuel.—Motion to proceed *ex parte*.—C. A. V.

Molson & Starnes, & The Hon. E. J. Flynn, respondent *par reprise d'instance*.—Motion of appellant, to force the Hon. E. J. Flynn to take up the instance in the place of the Hon. Mr. Starnes.—Granted.

Dorion & Crowley.—Motion to dismiss appeal.—Granted as to costs by consent.

Malbauf & Laurendeau.—Motion to dismiss appeal.—Granted as to costs.

Nov. 17.

Montreal, Portland & Boston Railway Co. & Hatton.—Heard on motion of respondent to set aside appeal bond.

Dorion & Dorion (No. 120).—Part heard.

Nov. 18.

Dorion & Dorion (No. 120).—Argument concluded; C. A. V.

Reilly & Hannan.—Heard; C. A. V.

Virtue & Vaillancourt.—Part heard.

Nov. 19.

Bury & Samuel.—Motion to proceed *ex parte* rejected with costs.

Merriman & Burroughs.—Motion for leave to appeal from interlocutory judgment, rejected with costs.

Montreal, Portland & Boston Railway Co. & Hatton.—Motion to reject security bond granted; bail bond set aside; eight days to enter new security.

Sipling & Sparham Fireproof Roofing Co.—Judgment confirmed.

Reed & Sparham Fireproof Roofing Co.—Judgment confirmed.

Hogan & City of Montreal.—Judgment reversed.

Quimet & Normandin.—Judgment confirmed.

Lighthall & Craig.—Judgment confirmed.

Foley & Cressy.—Judgment confirmed.

Gaudin & Ethier.—Judgment confirmed.

Virtue & Vaillancourt.—Argument concluded; C. A. V.

Les Curé & Marguilliers de l'Œuvre & Fabrique de Varennes & Choquet.—Motion for substitution granted. Heard on the merits; C. A. V.

Black & Shorey.—Heard; C. A. V.

Ross & Langlois.—Heard; C. A. V.

Nov. 20.

Outhbert & Evans, & Clarina.—Motion for substitution, granted by consent.

Wadsworth & McCord.—Parties heard as well on the motion of respondent to quash appeal as on the motion of appellant to file bailiff's return; C. A. V.

Stanton & Canada Atlantic Railway Co. & Bank of B. N. A. et al.—Part heard on merits of interlocutory judgment.

Nov. 21.

Stanton & Canada Atlantic Railway Co., & Bank of B. N. A. et al.—Argument concluded; C. A. V.

Lambe & Canadian Bank of Commerce.—The parties file a consent that Justices Tessier and Cross do sit in this cause.—Cause part heard on merits.

Nov. 22.

Lambe & Canadian Bank of Commerce.—Hearing on merits resumed and continued until the adjournment of the Court.

Nov. 24.

La Corporation du Village Chambly & Scheffer.—Judgment confirmed.

La Cie. du Chemin de fer Montreal & Sorel & Vincent et al.—Judgment confirmed.

Senécal & Vilette et al.—Motion for *congé d'appel* granted for costs.

Hubert & The City of Montreal.—Judgment reversed with costs; motion for appeal to Privy Council granted.

Lambe & Canadian Bank of Commerce.—Hearing resumed and continued until the adjournment.

Nov. 25.

Montreal, Portland & Boston Railway Co. & Hatton.—Motion of appellants, that the appeal bond already made and filed in this cause be held to be sufficient. The appellant filed duplicate of consent to execution. The respondent present in Court not objecting, the motion was granted.

Bell & Court, & McIntosh.—Motion to dismiss appeal, heard *ex parte*; C. A. V.

Lambe & Canadian Bank of Commerce.—Hearing resumed and closed; C. A. V.

Note.—With this case were also submitted the following :—

Lambe & Merchants Bank of Canada.—C. A. V.

Lambe & The Ontario Bank.—C. A. V.

Lambe & The Molsons Bank.—C. A. V.

North British & Mercantile Insurance Co. &

Lambe.—C. A. V.

Williams Manufacturing Co. & Lambe.—C. A. V.

Lambe & The Bank of Toronto.—C. A. V.

Ogdensburg Coal & Towing Co. & Lambe.—C. A. V.

Export Lumber Co. & Lambe.—C. A. V.

Biron & Trahan.—Heard on merits; C. A. V.

Deschenaux & Lizotte.—Part heard.

Nov. 26.

Bell & Court, & McIntosh.—Motion to dismiss appeal rejected without costs.

La Corporation du Bout de l'Isle & Reburn.—Judgment confirmed, Ramsay, J., dissenting.

Dunn & Wiggins.—Judgment confirmed.

Simpson & The Corporation of Ormatown.—Judgment confirmed.

Dorion & Dorion (No. 585).—Judgment reversed.

Poitras & Lalonde.—Judgment confirmed.

Deschenaux & Lizotte.—Hearing resumed and continued until adjournment.

RÈGLE.

Lorsque les causes de la campagne sont fixées à un jour, et que ce jour ne suffit pas pour en disposer, alors le jour suivant leur est réservé, et de même de jour en jour jusqu'à épuisement du rôle des causes de la campagne à l'exclusion des causes de la ville.

Nov. 27.

Beauchamp & Letourneau.—Judgment confirmed.

APPEL DES CAUSES PERIMÉES.

Joseph & Saunders.—Appeal dismissed.

Maclaren & La Société de Construction Métropolitaine.—Appeal dismissed.

Federal Bank & Brown.—Appeal dismissed.

Parker & Stewart.—Appeal dismissed.

Pangman & Lamarche.—Appeal dismissed.

Pangman & Buchanan.—Appeal dismissed.

Deschenaux & Lizotte.—Hearing resumed and concluded.

Pillow et al. & Cour du Recorder.—Heard on merits; C. A. V.

The Court adjourned until December 9 for judgments.

Dec. 9.

Senecal & Hatton.—Judgment reformed. Both parties move for leave to appeal to the Privy Council. Motions granted by consent.

Black & Walker.—Judgment confirmed, Monk and Cross, JJ., dissenting.

Canada Paper Co. & McDougall.—Judgment confirmed.

St. Arnaud & Leonard.—Judgment confirmed.

Bruneau & Benoit.—Judgment confirmed.

Eaton & Murphy.—Judgment confirmed.

La Cie du Chemin de Péage & Leclerc.—Judgment reversed.

RECENT DECISIONS AT QUEBEC.

Resolution of County Council. — *Jugé*, 10. Qu'il y a ouverture à la voie de cassation devant la Cour de Circuit, d'une décision ou résolution d'un conseil de comté, même siégeant en appel d'un règlement du conseil local, si le conseil de comté commet une illégalité.

2. Que c'est le cas d'appliquer les articles 100 et 698 qui ont rapport à tous les conseils municipaux, locaux ou de comté.—*La Corporation de St. Maurice v. Dufresne*, (Queen's Bench), 10 Q. L. R. 227.

Exclusion of Community. — *Jugé*, 1. Que dans le cas d'exclusion de communauté, le mari n'a que l'usufruit des biens meubles de sa femme à qui reste la propriété de tous ceux qui ne sont pas fongibles; qu'en conséquence le mari ne peut les aliéner, ni les créanciers du mari les saisir.

2. Que sous le régime d'exclusion de communauté, la preuve testimoniale est admise relativement aux meubles acquis par la femme depuis le mariage. — *Hôpital Général v. Gingras*, et *Lacroix*, oppt. (Superior Court, Casault, J.), 10 Q. L. R. 230.

Marine Insurance.—*Held*, that in an action for total loss on a policy of marine insurance, the plaintiff may recover for a partial loss.—*The Merchants Marine Insurance Co & Ross* (Queen's Bench), 10 Q. L. R. 237.

Freight—Goods damaged in unloading.—*Held*, that the master of a vessel is entitled to recover freight on the cargo delivered at the port of destination, though the goods have been damaged in unloading.

2. The recourse of the consignee may be in damages, by plea or incidental demand, to recover the loss sustained.—*Halcrow v. Le-mesurier*, (Queen's Bench), 10 Q. L. R. 239.

Petitory Action—Demurrer.—In a petitory action, to which the defendant demurred on the ground that the plaintiff had not alleged his title nor that of his *auteurs*, nor that the same were enregistered, *held*, over-ruling the demurrer, that such allegations were not necessary, and that the averment that the plaintiff's *auteurs* were, at the time of the sale to him, proprietors in open, public and peaceable possession of the land so sold, in virtue of good titles, was sufficient to render the declaration non-demurrable on the grounds urged by the defendant.—*Ross v. Lefebvre* (Court of Review), 10 Q. L. R. 244.

Controverted Elections Act, Canada—Corrupt Influence—Freedom of the press.—*Jugé*, 1. Que le fait de promettre de payer, ou de payer des comptes dus pour une élection antérieure, constitue une manœuvre frauduleuse.

2. Que l'engagement de charretiers pour mener voter les électeurs le jour de la votation constitue aussi une manœuvre frauduleuse.

3. Que la presse a droit de discuter la légalité d'un arrêt du tribunal, mais que si, en faisant sa critique, elle s'écarte de la vérité, elle devient justiciable du tribunal, pour mépris de Cour.—*Dussault et al. v. Belleau* (Superior Court, Caron, J.), 10 Q. L. R. 247.

THE COLERIDGE LIBEL CASE.

The action of *Adams v. Coleridge*, tried last week, reads more like a passage from one of those novels in which the late Mr. Anthony Trollope delighted to confide to his readers the domestic perplexities of persons in high places than a chapter out of real life. No advantage is to be derived from discussing the moral and social aspects of the case. Chief Justices have had trouble with their daughters before. Lord Coke, when he wished his daughter to marry according to his own choice, put on breastplate and sword and stormed the house in which she had taken refuge, pledging his knowledge of law that those who resisted him might be guilty of murder, while those on his side would be justified. Lord Coleridge is entitled to disapprove of a son-in-law if

the less because he happens to be Lord Chief Justice, and to enforce this disapproval by the only means in the power of a father towards an adult daughter—namely, by omitting her name from his will. Public opinion, no doubt, expects that a Chief Justice in such circumstances will not act out of caprice, but according to equity. It must be assumed that this natural expectation has not been disappointed, in the absence of any material to form an independent judgment. That material is not in existence; and without knowing all the circumstances, it is unfair to suggest that anything but justice has been done. The action of libel brought against Lord Coleridge's son by the intended husband in respect of a letter written to Miss Coleridge raises, however, in itself sufficiently important questions both in legal administration and the law of libel to merit full discussion.

The first question deserving inquiry is how Mr. Justice Manisty discharged the very delicate task of trying a case in which the interests of the chief of the bench on which he sits were directly involved. It is unlucky that the course adopted by the learned judge was such as not to satisfy the public. His action in declining to nonsuit the plaintiff in the first instance, and, immediately after the verdict of the jury for £3,000 damages, entering judgment, with costs, for the defendant, was easily open to misconstruction. It looked like a contemptuous treatment of the verdict of a jury in the interests of a brother judge. That nothing of the kind was intended is obvious to every lawyer, but difficult for laymen to understand. The only fault, if such it was, of the learned judge was in not regulating his conduct in a case of such sensational interest so as not to be misunderstood by the world at large. The course taken was, in fact, the most favourable that could be taken for the plaintiff. The learned judge was clearly of opinion that the occasion was privileged, and that there was no evidence of malice. Still the Court above him might be of a different opinion, and in order to avoid putting the plaintiff to the expense and annoyance of a new trial, if the other judges should differ from him, the learned judge allowed the question to go to the jury and the damages to be assessed. The practice before the Judica-

ture Acts, in such circumstances, was to let the case go to the jury, and to reserve leave to the defendant to move to enter a nonsuit, but this practice was rescinded in December, 1876. After the jury had given their verdict the judge might have declined to give judgment, and left the parties to move (Order XXXVI., rule 39). This practice was not uncommon in the early days of the Judicature Acts, but it is now unusual. Since the passing of the Judicature Act, 1876, which by section 17 requires that the action shall be disposed of by the judge at the trial, it is considered that the parties are entitled to the opinion of the judge who tried the case. The only other course open was simply to nonsuit the plaintiff. This is a course not infrequently followed by judges during their first years on the bench, but experienced judges hardly ever resort to it, knowing that it too often exposes the parties to a second trial. The criticisms, therefore, which have been made on Mr. Justice Manisty for 'overruling' the verdict of the jury proceed from want of knowledge of the procedure of the Courts, just as any suggestion of motive proceeds from a total ignorance of the character of the judge, and is at once repudiated by every lawyer who hears it. The mention of costs was due to a slip on the part of the Attorney-General. The costs followed the event—that is, the judgment—and the defendant could only lose them on the application of the plaintiff. Whether Mr. Justice Manisty was right in his two rulings fully deserves consideration. The first ruling, that the occasion was privileged, is supported by a decision of Baron Alderson in 1835, in the case of *Todd v. Hawkins*, 8 C. & P. 88. The action was brought against the son-in-law of a lady who, having become a widow, proposed to marry the plaintiff. The learned judge ruled that a son-in-law had sufficient interest in his mother-in-law to create a privilege for a letter written to her remonstrating upon the proposed marriage. The question of express malice was left to the jury, and a verdict found for the defendant. The decision, if it be sound law, covers the present case; but it was only a *Nisi Prius* decision, and although it bound Mr. Justice Manisty, will not bind the Courts above. The law of privileged occasions is somewhat vague, but,

according to Baron Alderson, an intimate friend of a person about to marry is entitled to give warning against the proposed marriage. It is clear that the line cannot be drawn at relatives, and it is difficult to draw the line at all so as to give a practicable definition, unless it is drawn at parents and guardians. Baron Alderson, in the case referred to, charged the jury to be rather liberal to the writer of such a letter in putting a construction on his motives, but the jury in *Adams v. Coleridge* passed a very stern judgment on the defendant. Possibly they misunderstood the frequent objections of the Attorney-General and the rulings of Mr. Justice Manisty against the plaintiff. These interruptions had in reality the effect of keeping the plaintiff straight in the conduct of his case. Whenever he was on the verge of committing an indiscretion which might have ruined his case, he was pulled up either by the judge or the opposing counsel. This may have looked like an attempt at repression, whereas it was in fact guidance, and may partly have accounted for the absurd verdict of £3,000 damages. This amount seems to have been suggested by a desire to compensate the plaintiff for the loss of dower with his intended wife—a consideration totally out of the question. If the jury were right in deciding that there was an excess of privilege, a complimentary sum as damages would have amply sufficed. The verdict having been arrived at, it is not easy to say that it is unsupported by evidence. If a younger brother is privileged to write to his sister defamatory statements of her intended husband, the law must carefully guard against any excess of such privilege. The jury were probably impressed by the tone of Mr. Coleridge's effusion, especially his 'not caring a fig,' his reference to the plaintiff's 'bluster,' and his imputation of sordid matrimonial views, and, above all, by the fact that the defendant, on being informed of the untruth of the statements which he had made, declined to enter into any further communication about them.

It may be assumed that the case will go either to the Divisional Court or the Court of Appeal. If the Attorney-General simply rests on the decision of Mr. Justice Manisty, the

plaintiff under Order XL, rules 4 and 5, must apply to the Court of Appeal if he desire to have judgment entered for him. If, however, the Attorney-General desire a new trial, either on the ground that the verdict is against the weight of the evidence, or that the damages are excessive, the Divisional Court will have jurisdiction over both motions. Under the old Rules there would have been two applications—one to the Court of Appeal and the other to the Divisional Court; but by the new Rules, if there is a motion for a new trial as well as a motion to reverse the entry of judgment, the Divisional Court hears both. The verdict of the jury was of course largely due to the fact that the defendant was not called as a witness. It was suggested on his behalf that the information on which he wrote was communicated confidentially, and that he could not go into the witness-box without a breach of confidence. But he did not appear in the witness-box to make this explanation. If he had declined to answer questions the worst that could have happened to him would have been his committal to prison by the judge; and the position of a man sent to prison for refusing to betray the confidence of his friends is not altogether without its consolations. Whether Mr. Justice Manisty be right or whether the jury be right, the result is unsatisfactory either way. If the former, the limits on the right of a brother to remonstrate with a sister on her proposed marriage have not been adequately considered; if the latter, ridiculously excessive damages have been given. — *Law Journal*, (London).

NEW PUBLICATIONS.

THE LAW OF MEDICAL MEN, by R. Vashon Rogers, Jr., of Osgoode Hall, Barrister-at-law: Publishers, Carswell & Co., Toronto.

The subject of his latest work, as may be supposed, affords the author ample opportunity for the display of a great deal of curious lore and the citation of a number of peculiar cases. Mr. Rogers begins with the Druids, as the first medical practitioners in England of whom there is any record. Surgery was pretty much restricted to the monks and clergy until the twelfth century, when the Council of Tours

enacted (A. D. 1163) that no clergyman or monk should undertake any bloody operation. From that time the practice of surgery fell into the hands of the barbers and smiths who had previously been employed as assistants and dressers to the ecclesiastical operators. The smiths were soon superseded by the barbers who, in 1461, were incorporated under the name of "The Company of Barbers in London," and none were allowed to practise save those admitted by the company. In 1745 the barbers in turn were ousted by the surgeons. The decisions bearing upon the practice of medicine and surgery are more numerous than might be supposed; and Mr. Rogers does not profess to have exhausted the list. A great many interesting cases, however, may be found bearing upon fees, who should pay the doctor, who may practise, negligence and malpractice, criminal malpractice, expert evidence, defamation, relations of medical men with patients, dissection and resurrection. Even dentists are not forgotten, and they are instructed as to the consequences of pulling the wrong tooth, etc. The works of Mr. Rogers have usually come to us from the other side of the line, although he is a Canadian barrister. The present work, however, appears in a Canadian dress, and is from the well-known house of Carwell & Co. We have already expressed our appreciation of Mr. Rogers, who like the prophets, has less honour in his own country than abroad. We trust that the present venture will make him better known at home.

BRITISH COLUMBIA LAW REPORTS.

The Pacific Province has commenced the task of reporting its judicial decisions, and the work appears to be very creditably executed by Mr. P. A. E. Irving, barrister-at-law, formerly of Hamilton, Ont. The reports are published under the authority of the Law Society of British Columbia.

LORRAIN ON LEASE AND HIRE.

We are glad to notice a new book which will form a valuable addition to the too small collection of works on the law of this Province. Mr. Léon Lorrain's "Code des Locateurs et Locataires" (Montreal, 1885: A. Périard, publisher) contains a succinct, but sufficiently complete, exposition of the law of Quebec on the contract of lease and hire of things, including the lease of cattle on shares, and emphyteutic leases. The work is divided into chapters and sections on the plan of the well-known work by

Aubry and Rau, and the doctrines laid down are supported by citations of the Articles of the Civil Code and of the decisions of our courts. There are also references to the old French authors and to the commentators on the Code Napoléon; but the citations are commendably short, and the reader's attention is not drawn away from the subject by the lengthy and over-subtle discussion which often renders theoretical treatises of little use to the practitioner. At the same time, the difficulties of the subject do not appear to have been passed over. For instance, the perplexing question arising from the redaction of Article 1657, as to the termination of a verbal lease for a definite period, is well discussed. We also notice a careful treatment of the disputed question whether the expression "to assign his lease," in article 1638, means a cession or sale of the lessee's rights, or merely a subletting of the thing in its entirety.

We may add that the typographical part of the work has been very correctly and neatly done, and is highly creditable to the publisher.

CANADA GAZETTE NOTICES.

Henry B. Beard, Q.C., of Woodstock, Ont., has been appointed deputy judge of the county court of the county of Oxford.

The Union Bank of Lower Canada gives notice of a semi-annual dividend of two per cent.; the Standard Bank of Canada gives notice of a semi-annual dividend of three and a-half per cent.; the Bank of London in Canada of a semi-annual dividend of three and a-half per cent.; the Bank of Commerce of a semi-annual dividend of four per cent.; the Banque de St. Jean of a semi-annual dividend of three per cent.; and the Imperial Bank of Canada of a semi-annual dividend of four per cent.

Letters patent have been issued to "The English and Canadian Wire Fastening Company of Montreal, Canada (Limited)"; capital \$300,000; incorporating M. C. Mullarky, Jas. Leggett, A. T. Keegan, M. D. Barr, Louis Côté, and O. E. Lewis. Supplementary letters patent have been issued to the "Black Diamond Steamship Company of Montreal (Limited)," increasing the capital from \$300,000 to \$500,000.

Notice is given of an application to incorporate the Synod of the Evangelical Lutheran Church of Canada under the name of the "Evangelical Lutheran Synod of Canada"; to authorize the Dominion Grange Mutual Fire Insurance Association to insure against loss by fire the property of members of the Patrons of Husbandry; to authorize the Richelieu and Ontario Navigation Company to issue debentures, etc.

The Legal News.

VOL. VII. DECEMBER 20, 1884. No. 51.

THE TAX ON EXHIBITS.

The official text of the judgment of the Privy Council in *Loranger & Reed* (5 L. N. 397) has not yet been received, but it appears from the *Times'* report that their lordships have held the ten cent fee on filing exhibits to be an indirect tax. Their lordships apparently also hold that the Act imposing the ten cents did not relate to the administration of justice in the province nor to the maintenance of the provincial courts. The judgment of the Supreme Court of Canada, which reversed that of our Court of Queen's Bench, is affirmed. The final decision supports that rendered by Mr. Justice Mackay in the Court of first instance—(*Reed v. Roy*, 5 L. N. 101).

TRADE MARKS.

The question as to how far a person may be interfered with in the use of his own name came up lately in Wisconsin. The opinion of the Court (*Landreth v. Landreth*, U. S. C. C. E. D. Wis., 22 Fed. Rep. 41) was to the effect that while a party cannot be enjoined from honestly using his own name in advertising his goods and putting them on the market; nevertheless, where another person, bearing the same surname, has previously used the name in connection with his goods in such manner and for such length of time as to make it a guaranty that the goods bearing the name emanate from him, he will be protected against the use of that name, even by a person bearing the same name, in such form as to constitute a false representation of the origin of the goods, and thereby inducing purchasers to believe that they are purchasing the goods of such other person.

OBITUARY.

James Bethune, Q.C., a prominent member of the Ontario bar, died at Toronto, Dec. 18, of typhoid fever. Mr. Bethune was born in Glengarry county in 1840, and called to the bar in 1862. Within a very few years he acquired a leading position in the profession,

which he retained up to the time of his death. For five years he acted as county crown attorney for the united counties of Stormont, Dundas and Glengarry, where also for some time he performed the duties of deputy judge. Mr. Bethune was engaged in a great many of the most important cases that have come up in the sister province during recent years, and his services were highly esteemed. By the premature termination of his career the Ontario bar is deprived of one of its ablest members.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, Dec. 6, 1884.

Before DORION, C. J., RAMSAY, TESSIER, CROSS and BABY, JJ.

DERY et al. (defts. below) Appellants, and
HAMEL (plff. below), Respondent.

*Sale of right to use invention — Warranty—
Denial of signature—Procedure—Damages
—Commercial matter.*

1. *Where two persons sued jointly on a writing, plead together to the merits, they cannot afterwards urge that the signature to the writing is not the signature of both or of either of them, more especially in the absence of an affidavit denying the signature as required by Art. 145 C.C.P.*
2. *The sale of the right to use an invention contains a warranty that the invention is new and useful.*
3. *The purchaser of such right is not required to have the patent set aside before he can recover the price paid by him.*
4. *The use of a patent for manufacturing purposes is a commercial matter.*

RAMSAY, J. A great number of questions have been raised in this appeal, which is from a judgment in an action to recover back a sum of money paid for the cession of the rights of patent to manufacture and employ the said invention in the parishes of Deschambault and Cap Santé, the patent for which was originally acquired by one Stone. The most important question raised is whether both the appellants ought to be condemned, or only one of them, Cyprien Dery. They say that the signature "J. & C. Dery," is not the

signature of both or of either, and that really J. Dery is shown by the evidence to have had nothing to do with the transaction. The most effective answer to all this is that, sued jointly on the deed, they appeared together, and pleading together said they were justified in making the sale. Under these circumstances it seems idle now to make these distinctions, and further there is no affidavit as required by Art. 145 C. C. P. Appellants say this was not necessary because "J. & C. Dery" could not be the signature of either of them. It seems to me that this distinction cannot be maintained. When the law says "every denial of a signature" it evidently means "of what purports to be a signature," else a defendant might always neglect to make the affidavit, and say "Oh! it was not a signature, for I never signed it; it is therefore only the semblance of a signature, so far as I am concerned."

The next question in importance is as to the effect of the sale of the right to use an invention. Appellants say there was no special warranty, and the warranty of law is only that the patent exists. No authority could be brought forward in support of this pretension, nor has any parallel case been established. It evidently is not the sale of a chance, like the draw of a net, as was suggested. But it is not necessary to discuss this question minutely, for the deed from appellants to respondent contains a description, which amounts to a warranty, and which every patent implies, that the invention is new and useful. It would be strange, indeed, if that which can only exist at all on the pretension that it is new and useful, could be bought and sold as such, and yet be neither. The sale of patent rights, therefore, comes very specially under Art. 1522, C. C., and I would also draw the attention of appellants to the terms of the 35 Vic., c. 32, sections 19 and 20, which gives some additional force to what I have said as to express warranty.

Another question allied to that just referred to is, that the patent should have been set aside first. There might be something in this, if the existence of the patent was the only warranty, but that not being the case, respondent has no interest to set aside the patent, and therefore he was not called upon

to raise that issue. It is said that under the proceedings taken, the patent might be declared neither new nor useful as regards respondent, and again be declared good and useful as regards somebody else. That is only to say that *res judicata* only binds the parties to the suit.

Appellants do not plead, nor do they urge in their factum, that the invention was new and useful. On this point nothing can be said. It appears Mr. Stone has disinterred from the history of dressing skins and hides, an exploded system two centuries old, for the special advantage of Her Majesty's lieges in the somewhat over-confiding Province of Quebec.

But it is said there is no proof of damage. The Court will not, in a case like this, interfere with the discretion of the Court below in assessing damages, unless they appear to be exorbitant under the circumstances, which they are not in this case. The respondent has been obliged to find funds, set agoing a business only to discover that he had purchased a troublesome suit. These damages are exemplary and they are not limited by article 1075 C. C.

As to the joint and several condemnation, we think the use of a patent for manufacturing purposes is a commercial matter.

Judgment confirmed.

COURT OF QUEEN'S BENCH.

QUEBEC, Dec. 6, 1884.

Before DORION, C. J., MONK, RAMBAY, CROSS and BABY, JJ.

LEMBIEUX, Appellant, and LA CORPORATION DE ST. JEAN CHRYSTOSTOME, Respondent.

Superintendent of Education—Jurisdiction.

Held, unanimously, that it is not necessary that the petition in appeal to the Superintendent of Education should contain affirmatively the allegation that the appeal to the Superintendent is authorized by three visitors, if it appear that there was such authorization. And it will be presumed the authorization existed when the sentence alleges it did, unless the fact be contradicted.

The School Commissioners decided that a school-house should be built on a particular site. The appeal was as to the site, and the Superintendent selected another site, and

ordered the Commissioners to build on the new site.

Held (by Sir A. A. DORION, C. J., MONK and CROSS, JJ.) that his sentence was valid, being within the powers of the Superintendent.

Held, (by RAMSAY and BABY, JJ.) that the Commissioners not having passed on the question of building on the new site, and the Superintendent having no original jurisdiction in the matter, he had exceeded his jurisdiction, which was exceptional, and consequently *de droit étroit*. *Vide* 40 Vic. c. 22, s. 11.

Judgment reversing the judgment of the Superior Court.

COURT OF QUEEN'S BENCH.

QUEBEC, Dec. 6, 1884.

Before DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

LA CORPORATION DU SACRÉ CŒUR, Appellant, and LA CORPORATION DE RIMOUSKI, Respondent.

Municipal Code, Art. 82.

Held, (reversing the judgment of the Superior Court) that Art. 82, M. C., gives the recourse of the old Municipality against the rate-payers of the new municipality, or such of them as are owners of lands subject to an old obligation, and not against the new municipality.

The Chief Justice intimated that as this case was evidently instituted to test a question of law between the two municipalities no costs would be allowed on the appeal.

SUPERIOR COURT.

[Enquête Sittings.]

MONTREAL, Dec. 13, 1884.

Before TORRANCE, J.

KENNEDY v. O'MEARA.*

Evidence—Proceedings in criminal prosecution—32 & 33 Vict. c. 30, s. 58.

The clerk of the Police Magistrate, being called as a witness in a civil suit, was asked to state the contents of a criminal information. This was objected to on the part of the defendant, on the ground that

the prosecution in question was not terminated, and he cited 32 & 33 Vict. c. 30, s. 58.

The Court held that the rules of the Criminal Procedure Act cited only apply in criminal proceedings, and that copies of the proceedings in the criminal prosecution should be furnished on payment of the usual fees.

J. Crankshaw for plaintiff.

J. J. Curran, Q. C., for defendant.

SUPREME COURT OF CANADA.

OTTAWA, June 19, 1883.

Before RITCHIE, C.J., STRONG, FOURNIER, HENRY, TASCHEREAU and GYWNNE, JJ.

GRANGE (def.), Appellant, and McLENNAN (plff.), Respondent. (9 S. C. Rep. Can. 385.)

Promise of Sale, Construction of—Condition precedent—Mise en demeure.

The appeal was from a judgment of the Court of Queen's Bench, Montreal, reported in 6 L. N. 138.

On the 7th December, 1874, G. by a promise of sale, agreed to sell a farm to M., then a minor, for \$1,200, of which \$500 were to be paid at the time, balance payable in seven yearly instalments of \$100 each, with interest at 7 per cent. M. was to have immediate possession and to ratify the deed on coming of age, and to be entitled to a deed of sale, if instalments were paid as they became due; "but if on the contrary M. fails, neglects or refuses to make such payments when they come due, then said M. will forfeit all right he has by these presents to obtain a deed of sale of said herein-mentioned farm, and he will, moreover, forfeit all monies already paid, and which hereafter may be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee." After M. became of age he left the country without ratifying the promise of sale; he paid none of the instalments which became due, and in 1879 G. regained possession of the farm. In October, 1880, M. returned and tendered the balance of the price, and claimed the farm.

The Supreme Court held (Strong and Taschereau, JJ., dissenting), reversing the

* To appear in Montreal Law Reports.

judgment of the Court of Queen's Bench, that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to lessor and lessee.

Judgment of Q. B. reversed.

Doutre, Joseph & Dandurand for Appellant.
Davidson & Cross for Respondent.
R. Laflamme, Q.C., counsel.

SUPREME COURT OF CANADA.

OTTAWA, April 19, 1883.

Before RITCHIE, C.J., STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, J'.

HARRINGTON et al. (defts. *en gar.*), Appellants, and CORSE (plff. *en gar.*), Respondent. (9 S.C. Rep. Can. 412.)

Will, Construction of—C.C. 899—Liability of universal legatee for hypothec on immovables bequeathed to a particular legatee.

The appeal was from a judgment of the Court of Queen's Bench, Montreal, reported in 6 L.N. 148; 27 L.C.J. 79.

On the 30th April, 1869, S. being indebted to P. in the sum of \$3,000, granted a hypothec on certain real estate which he owned in the city of Montreal. On the 28th June, 1870, S. made his will, in which the following clause is to be found: "That all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named as soon as possible after my death." By another clause he left to H. in usufruct, and to his children in property, the said immovables which had been hypothecated to secure the said debt of \$3,000. In 1879, S. died, and a suit was brought against the representative of his estate to recover the sum of \$3,000 and interest.

The Supreme Court held (Strong, J., dissenting), reversing the judgment of the Court of Queen's Bench: That the direction by the testator to pay all his debts included the debt of \$3,000 secured by the hypothec.

Per FOURNIER, TASCHEREAU, and GWYNNE, JJ.: When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, Art. 889 of the C.C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee.

Judgment of Q.B. reversed.

Doutre & Joseph for Appellant.

S. Bethune, Q.C., and *Robertson, Q.C.*, for Respondent.

HIGH COURT OF JUSTICE.

[Crown Case Reserved.]

Nov. 29, 1884.

REGINA v. WELLARD.

Nuisance—Indecent Exposure—Public Place.

Case stated by the Chairman of the Kent Quarter sessions.

The prisoner was convicted of the misdemeanour of indecently exposing his person to divers liege subjects of the Queen in a certain open and public place. The evidence showed that in the middle of the day the prisoner induced seven or eight little girls to go with him along a public footpath, and, after some distance, to turn off the footpath on to a place called the Marsh. Here the prisoner lay down out of sight of the footpath and committed the offence. When the prisoner and the girls turned off from the footpath they were, legally speaking, trespassing; but all persons who desired to do so were in the habit of going on to the Marsh, and no one interfered with them.

F. J. Smith, for the prisoner, contended that the Marsh was not at law a public place, and that the offence charged could not be committed on private property unless in view of persons in some public place and as of right.

No counsel appeared for the prosecution.

THE COURT (LORD COLERIDGE, C. J., GROVE, J., HUDDLESTON, B., MANISTY, J., and MATHEW, J.) affirmed the conviction, holding that to constitute the offence charged it was not necessary that it should be committed in a place to which the public were admitted to have access as of right.

Conviction affirmed.

[Crown Case reserved.]

May, 1884.

REGINA V. DE BANKE.

Larceny by bailee.

The prisoner was engaged by the owner of a horse to look after it for a few days, with authority to sell it. He sold it for £15. The owner having sent his wife to receive the money the prisoner showed her a check, but refused to hand it over, saying that he would go to the bank to cash it. He came out of the bank and said they would not cash it. Being again asked to hand it over, he ran away. Held, by Lord Coleridge, C.J., Grove, Field and Smith, JJ., (Stephen, J., dissenting), that the prisoner was rightly convicted of larceny of the £15.

The prisoner was indicted at the Shropshire Quarter Sessions for embezzling the money of his employer. The evidence, so far as it is material to the point reserved, was as follows:—Joseph Toker, the prosecutor, proved: On the 11th January, I drove a chestnut mare into Chester with prisoner; I left her at Mr. Wild's, a butcher; I engaged the prisoner to look after her. I said to him: "Do the mare well, and I will be here on Wednesday morning and will pay you for your work;" he was to have charge of her till I came; I told him to pay for the keep till I came; I meant him to look after her altogether; I should not have objected to his doing anything else; on Saturday, January 12th, I saw prisoner; I asked him how the mare looked, and he said she was as lame as a cat; he said he had removed her to his father's house; I said I should be at Chester by the first train; I told him the mare should be sold on the Wednesday morning when I went, as she would not do for me; I sent my wife on that morning; I have never received a farthing from prisoner on account of the mare.

Annie Suker, wife of prosecutor, proved: I went to Whitchurch on the 16th of January; I saw prisoner in the street; I asked him if he had sold the mare he said he had not; I went with him to Wild's stables; saw mare taken out of the stables into the street; prisoner was riding the mare about the fair; Mr. Foster bought her; prisoner, Mr.

Foster and Arthan went to the Queen's Head together; I was outside the door and watched; I saw Foster give prisoner some money; prisoner came out and showed me a check; he did not give it to me; he said we would go to the bank and get it cashed; I asked him for it several times but he would not part; he told me had sold the mare for £13; he came out of the bank and said they would not cash him the check; I asked him to give it to me, and said I would pay his expenses; he would not do so; I said he must come with me to Whitchurch, and I must have either the money or the mare; I had great difficulty in getting him to the station; at Whitchurch, when we got to the gasworks, he bolted down a little alley which leads to the canal; I ran after him and called, but he did not answer; I have never received any money for the mare.

Joseph Arthan proved the sale of the mare by the prisoner to Foster, and payment of £15 to the prisoner.

Robert Thomas, sergeant of police, proved that the prisoner absconded from Whitchurch on the 18th of January. The prisoner was arrested at Chester on the 31st of January.

The Chairman held there was no evidence to go to the jury of the defendant's employment as a servant, so as to make him guilty of embezzlement. It was then contended, on behalf of the defendant, that there was no evidence of the larceny of £15. The case was left to the jury who found "that the prisoner had authority to sell the mare and converted the money to his own use," and a verdict of "guilty of larceny" was recorded.

The question reserved for the opinion of this court was whether there was any evidence of larceny which could properly have been left to the jury.

No counsel appeared.

LORD COLERIDGE, C.J.—I think this conviction may be supported. There may be considerable room for doubt whether under the circumstances the prisoner was not entrusted as a servant; but we have not now to consider this point, the chairman having ruled otherwise, and the jury not having had the question left to them. The only point remaining is whether there is any evidence of

larceny. I think the effect of the evidence is that the prisoner was there to sell the mare, and receive the money for the prosecutor if he were present, and, if not present, then to sell and hold the money for him or his agent until he should come. I hold that the prisoner was a bailee of the money for the wife, who attended as agent of the prosecutor. She demanded the money, the prisoner refused, and thereupon the case falls directly within the words of the statute.

GROVE, J.—I am not free from doubt as to whether the prisoner was in the position of bailee. Although the evidence is ample that he took the money, yet it is clear that the money was not given to him on behalf of the prosecutor. But I think he is none the less a bailee by reason of his not having received the money directly from the hand of the prosecutor.

FIELD, J.—I agree, but not without some hesitation, that this conviction ought to be affirmed. The question is whether there was reasonable evidence that the prisoner was a bailee. It is important to note that the sale was for cash, that there had been no previous dealings between the parties, and that the prisoner was not a horse-dealer or agent who might probably be justified in mixing the money received with his own, as has been held in the case of a stock-broker charged with a similar offence.

STEPHEN, J.—I am sorry to be obliged to differ from the rest of the court, but this difference is due to the interpretation I place upon the facts rather than upon the application to them of any principle of law. I think the present case is governed by the case of *Regina v. Hassall*, 1 W. R. 708, L. & C. 58, where it was held that one who receives money, with no obligation to return the identical coins, is not a bailee of such coins within the 24 and 25 Vic. c. 96, sec. 3, under which the present prisoner has been convicted. Here there is nothing to show that the prisoner was bound to return the coins received for the horse, it was not so understood by the parties, and, in fact, the evidence negatives this view. The prisoner was authorized to sell the horse in the ordinary manner, and, if the check was part of the price paid, the wife raised no objection to his cash-

ing it. If he had got it cashed at the bank no objection would have been raised, and the prosecutor would have been satisfied whether he got the check or the proceeds. If so, it cannot be said that there was any obligation on the prisoner to hand over the specific coins received.

I may mention also that under section 72 of the same statute, which permits a conviction for larceny under an indictment for embezzlement, as was done in the present case, there is no power to convict of larceny as a bailee; but I do not in any way base my judgment upon this, because I think simple larceny includes larceny by a bailee.

A. L. SMITH, J.—The difference of opinion between the members of the court arises more upon a question of fact than of law. Upon the evidence before us I agree with the majority of the court that the prisoner was rightly convicted as a bailee of the money demanded of him by the wife of the prosecutor.

Conviction affirmed.

NEW YORK SUPREME COURT, GENERAL TERM, OCTOBER 1884.

HAYES v. NEW YORK CENTRAL R. Co.
Railroad—Passenger's ticket.

If a passenger on a railroad train mislays his ticket, and acting in good faith fails to find it, until after the conductor rings the bell for the purpose of stopping the train and ejecting him; in an action against the carrier to recover damages for an unlawful ejection under such circumstances,

Held, that the omission to find and surrender the ticket or pay his fare before the bell rang is not equivalent to a refusal to do so.

Held, further, that the passenger is entitled to a reasonable opportunity to find his ticket if he can, and in default to pay his fare, and it is a question of fact for the jury to determine whether or not such reasonable opportunity was allowed.

Appeal from judgment entered upon a nonsuit directed at Oneida Circuit, May, 1884, and from an order denying a motion for a new trial on the minutes. The action is brought to recover damages for ejecting plaintiff from the train on its passage from

Utica to Rome on the morning of September 11, 1881. At the close of the evidence the defendant moved for a nonsuit which motion was granted and plaintiff excepted.

MERWIN, J. Concededly the plaintiff had a ticket from Utica to Rome, that he had purchased the afternoon before. As to what occurred just prior to his ejection, there is a conflict of evidence. On the part of plaintiff, there was evidence tending to show that as the conductor came along and asked the plaintiff for his ticket he tried to find it and couldn't; told the conductor he had one and would find it in a minute; felt through his pockets, said to the conductor, "you go through the train and by the time you come back I will find my ticket, if I don't, I have money to pay my fare;" that the conductor said, "find your ticket or get off the train;" that the plaintiff said, "maybe you better put me off this train;" that then the conductor pulled the bell-rope to stop the train; that before it fully stopped the plaintiff found his ticket and offered it to the conductor who refused to take it and put the plaintiff off.

On the part of the defendant the conductor testified that the plaintiff was in the next to the last car; that as he came along he asked him for his ticket; that the plaintiff found what was apparently a ticket and the occurrence then proceeded as follows: "I asked him for his ticket: he said he would not give it to me until he got to Rome; I said if you don't give me that ticket I will have to put you off; he said, I won't give it to you; I said, very well, I will have to stop the train and put you off; I then rang up the train, the train stopped at once, then I told him to get out; he got up and walked out down on the ground, then he wanted me to take the ticket and I refused; I told him I had stopped the train to put him off and I wouldn't carry him; I didn't stop that train for any purpose except to have him get off; the rules are, ring up the train and put off a man who don't show his ticket or pay his fare."

The nonsuit was granted apparently upon the theory that as according to the plaintiff's evidence, the ticket was not produced and tendered before the bell was actually rung therefore the conductor was justified in putting the plaintiff off.

The counsel for defendant claims that the omission to produce the ticket was equivalent to a refusal, and brings the case within *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455. In that case the plaintiff had a ticket from Hornellsville to Scio; had shown it to the conductor once, and then, afterward and after the train had passed another station, was asked to show it again and refused and was put off. It was held at Circuit that he was not bound to show it again: but the Court of Appeals held that he was, and that a rule to that effect was reasonable, and reversed the judgment.

In *O'Brien v. N. Y. C. & H. R. R. Co.*, 80 N. Y. 236, it is said by Rapallo, J., that if in consequence of the fractious refusal of a passenger to pay the full fare the company has a right to demand, the train is stopped for the sole purpose of putting him off, he is not entitled to insist on continuing his trip on paying the fare, but may be removed from the train. If, however, the stoppage is at a station, a tender before removal would answer. *Guy v. N. Y. C. & W. R. Co.*, 30 Hun, 399; *Pease v. D. L. & W. R. Co.*, 16 W. Dig. 266.

In *Maples v. N. Y. & N. H. R. Co.*, 38 Conn. 558, the rule is laid down that a passenger whose ticket is mislaid is entitled to a reasonable time to find it.

In *Railroad Co. v. Garrett*, 8 Lea (Tenn.), 438, it was held that a passenger who gets upon a train in good faith, in ignorance of the fact that a tax certificate would not pay his fare, having no intention to impose upon the carrier, cannot be treated as a mere trespasser, but on failure or refusal to pay his fare after request and after reasonable opportunity allowed to comply, he may be ejected, but if before eviction another person offer to pay the fare the carrier is bound to receive it and convey the passenger. The offer in that case was after the bell was rung to stop the train. In the present case if the ticket of the plaintiff was mislaid and he in good faith was trying to find it, he was entitled to a reasonable time to enable him to do so, if he could, and if in case of failure to find it after such reasonable opportunity he was willing and ready to pay his fare, the conductor had no right to put him off. Whether

or not the plaintiff was allowed such reasonable opportunity to find his ticket or pay his fare was, upon the evidence on the part of plaintiff, a question of fact to be determined by the jury. If so the nonsuit was improperly granted.

A question is made by the appellant that the removal was not at or near any dwelling house. This is not set up in the complaint, and no point was apparently made about it at the trial. It does not seem important to consider it here.

The judgment should be reversed and nonsuit set aside and new trial granted, costs to abide the event.

Hardin, P. J., and Follett, J., concur.

CANADA GAZETTE NOTICES.

Parliament is called for the dispatch of business, on Thursday, January 29, 1885.

The Royal Canadian Insurance Company gives notice of an application for authority to reduce its capital stock to \$500,000, each share to be \$25, of which \$20 paid up and \$5 subject to be called in, and to amend its charter otherwise.

Les Fidèles Compagnes de Jésus, of district of Saskatchewan, are applying for an act of incorporation.

The Tecumseh Insurance Company will apply to revive its Act of Incorporation, 45 Vict. c. 105.

The Brantford, Waterloo and Lake Erie Railway Company will apply for an act of incorporation.

The Hamilton Provident and Loan Society asks for a declaratory act as to powers, and for other purposes.

The Pension Fund Society of the Bank of Montreal asks for an act of incorporation.

An Act is sought to incorporate a company to build and maintain a bridge across the St. John River, at or near Fredericton, N. B.

The City of Toronto applies for an act to regulate the use of the esplanade by railway companies, &c.

The Canada Granite Company, Ottawa, applies for Letters Patent.

RECENT U. S. DECISIONS.

Fire Insurance—Introduction of new partner into firm avoids.—The sale or transmutation of the various interests between partners

themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy; but the introduction of a new partner, with an investiture of an interest in him which he did not have before, does invalidate the policy. *Cir. Ct., D. Minnesota, June 26th, 1884. Drennen v. London Assurance Corp.* Opinion by Miller, J. (20 Fed. Rep. 657.)

LIABILITY OF A TELEGRAPH COMPANY.

The New York Superior Court, in the recent case of *Muliken v. The Western Union Telegraph Co.*, decided an interesting question relative to the obligations existing on the part of a telegraph company towards the receiver of a message. The plaintiff in this case, a broker in plays, sued the defendant for damages resulting from loss of sale of a play, from the failure of defendant, through mere carelessness and negligence, as alleged, to deliver a cable message sent to plaintiff from Paris, which defendant had agreed to deliver, but had declined to receive pay in advance, proffered by plaintiff. The defendant demurred to the complaint, claiming that the receiver of a message could not hold a telegraph company liable to him *ex contractu* other than upon the contract entered into between the company and the sender of the message.

In rendering its opinion the Court said: "Giving to the facts alleged in the complaint, and admitted by the demurrer, the consideration most favorable to the plaintiff, and giving full weight and every reasonable intendment and inference in support of his action, I am yet unable to find any contract between him and the defendants, or any privity between them, or any special duty or obligation on their part to him, or any consideration moving from the plaintiff to the defendant sufficient to support a contract between them, for the breach of which a right in him to recover damages from the defendant could arise."—*New York Daily Register*.

GENERAL NOTES.

The *Legal News* (Montreal) sends us the first number of "The Montreal Law Reports," a new series, to be published in connection with that journal, containing decisions of the Superior Court, Court of Review, and Court of Queen's Bench. The number is very handsomely printed, and apparently well edited.—*Albany Law Journal*.

The Legal News.

VOL. VII. DECEMBER 27, 1884. No. 52.

SENECAL & HATTON.

The decision of the Court of Appeal upon one part of this case is of considerable importance. The defendant, Senecal, retained in his possession, without any legal right to do so, certain railway bonds. Apart from the questions of fact (as to which the Court of Appeal confirmed the decision of Mr. Justice Torrance, 6 L.N. 220), a question of law arose as to the alternative to which the defendant should be condemned in default of his giving up the bonds. The plaintiff by his action asked for the bonds, or their value *at par*. The Court below adopted this view (more especially as it was difficult on the evidence to fix the precise value), but the Court of Appeal has varied the judgment in this respect, and held that the defendant should be condemned in the alternative merely to pay the actual or market value of the bonds as established in evidence. By the formal judgment in appeal the value assigned to the bonds (25 per cent.) is said to be the value at the time the defendant got them.

Another question involved in the case is of some interest, but no reference was made to it in the judgment. Coupons were attached to the bonds, falling due every six months, and representing six per cent. interest on the *par* value of the bonds, the capital of which is only payable at the expiration of twenty years. Mr. Justice Torrance allowed interest on each coupon as it became due, without requiring proof of demand of payment. This ruling was supported by decisions of the Supreme Court of the United States (see 6 L.N. 385, where the cases are cited). It is also in accordance with the unanimous judgment of the Court of Review in *Desrosiers v. The Montreal, Portland & Boston Railway Co.* (6 L.N. 388). The form given to the judgment in appeal made it unnecessary to pass upon this question, because, instead of valuing the coupons separately, the judgment allows interest upon the valuation of

the bonds from the date of their issue. It might be inferred, perhaps, that the claim for interest on the coupons had been rejected, or at least overlooked, but we are inclined to think, seeing the form of the judgment, that this decision could hardly be cited as overruling the formal decision of the Court of Review in *Desrosiers v. The Montreal, Portland & Boston Railway Co.*

EX PARTE PERRY.

A few words may suffice for the present by way of appendix to the report in *Ex parte Perry*, 7 L. N. 330. Dr. Vallée, who was named *expert*, reported that the patient, Rose Lynam, might safely be liberated if placed in the care of some one other than her husband. Mr. Justice Jetté thereupon ordered the assembly of a family council to advise as to the appointment of a guardian. The majority of the council recommended that she be placed in the charge of the Lady Superior superintending Longue Pointe Asylum. As this would be leaving matters precisely as they were before, the learned judge overruled the advice of the majority and adopted that given by two of the friends, viz, that she be placed in the care of Mr. Alfred Perry.

THE SALVATION ARMY IN MONTREAL.

The religious enthusiasts known by this title have at length put in an appearance in Montreal, but upon their attempting to walk through the street playing tambourines, they were promptly arrested by the police and taken before the Recorder. The case was argued at great length, and with much ability, and the Recorder, in an elaborate judgment, ruled that the prisoners must be discharged, as the evidence did not support the complaint, which was to the effect that the accused were employing a device, noise and performance tending to the collection of persons in a public place, to the obstruction of the same. The Recorder ruled that on the evidence it appeared the intention of the defendants was to bring people to church, and not to gather them in the street and obstruct the same.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Dec. 9, 1884.

Before DORION, C. J., MONK, RAMSAY, TESSIER
and CROSS, JJ.

SENECAL (def. below), Appellant, and HATTON
(plff. below), Respondent.*

*Detention of bonds—Condemnation in event of
failure to deliver.*

Upon the facts of the case, the Court was of opinion (confirming the judgment of the Court below) that the defendant (appellant) was bound to return certain railway bonds which had been placed in his hands by the plaintiff's assignor.

Held, reforming the judgment of the Court below (6 L. N. 220), that the condemnation against the defendant, in default of returning the bonds, should be to pay the actual value thereof as established in evidence, and not the par value.

Judgment reformed.

Lacoste, Globensky, Bisailon & Brosseau for the Appellant.

Hatton & Nicolls for the Respondent.

S. Bethune, Q. C., and *C. A. Geoffrion*, counsel for Respondent.

SUPERIOR COURT.

MONTREAL, Dec. 10, 1881.

Before JETTÉ, J.

BERNARD, Requéant, et BRILLON, Défendeur.*

L'Acte des élections contestées de Québec de 1875
— *Bulletin.*

JUGÉ: 1. Que le secret de la votation est établi en faveur du voteur, et qu'il peut, lorsqu'il réclame son bulletin, déclarer de vive voix pour qui il entend voter, sans pour cela perdre son droit de vote.

2. Que dans l'espèce les marques faites sur le bulletin par le sous-officier rapporteur, pour la référence de ce bulletin à l'objection

faite à ce vote n'affecte pas le bulletin, et qu'il doit être compté.

Mercier, Beausoleil & Martineau for Petitioner.

A. Lacoste, Q. C., for Defendant.

COUR DE CIRCUIT.

MONTREAL, 9 déc. 1884.

Coram MOUREAU, J.

BERGERON v. ROY, et JEAN-BTE ROY, opposant, et P. M. DURAND, demandeur sur distraction de frais, contestant.

Faillite—Créance non portée au bilan—Décharge.

JUGÉ:—*Que le créancier d'un failli, pour une somme moindre que \$100, et dont le nom et la créance n'ont jamais figuré au bilan de ce failli, peut exercer ses recours contre lui et le contraindre à payer, bien qu'il ait obtenu sa décharge.*

Antérieurement à la faillite de l'opposant, le contestant avait obtenu contre lui en cette cause jugement sur distraction de dépens.

Depuis la date de ce jugement, l'opposant a obtenu sa décharge sous l'acte de faillite de 1875, et le contestant sans égard à cette décharge, dont il ignorait d'ailleurs l'existence, a fait saisir le mobilier de l'opposant en vertu de son jugement.

A l'encontre de cette saisie l'opposant a produit une opposition par laquelle il allègue:

Que la dette pour laquelle le demandeur distrayant a fait pratiquer la saisie en cette cause, est antérieure à la faillite de l'opposant.

Que dès avant cette saisie, savoir: le 30 mai 1884, le dit opposant a obtenu sa décharge conformément à la loi, pour toutes ses dettes contractées avant sa dite faillite et à l'époque d'icelle, et que l'opposant est bien fondé à demander mainlevée de la dite saisie.

A cette opposition le contestant a répondu:

Que lors de sa faillite, l'opposant a fourni au syndic un état ou bilan contenant le nom de ses créanciers, mais que le nom du contestant n'a jamais figuré à ce bilan, ainsi qu'il appert par la copie du dit bilan, produite au soutien des présentes. Que par conséquent, l'opposant ne se trouve nullement acquitté de la créance du contestant ni du jugement obtenu par lui contre le dit opposant; et qu'aux termes des sections 17 et 61

* To appear in Montreal Law Reports.

de l'acte de faillite de 1875, il ne peut lui opposer sa décharge.

La Cour a pris la cause en délibéré et après mûr examen a renvoyé l'opposition avec dépens.

Opposition renvoyée.

Lacoste et associés, pour l'opposant.

P. M. Durand, contestant.

(J.G.D.)

Un jugement dans le même sens et qui n'a pas été rapporté aux annales judiciaires, fut rendu à Montréal le 9 octobre 1871, dans la cause de *Bourguignon v. Archambault et Archambault*, opposant, et *Bourguignon*, contestant. (J.G.D.)

COUR DE CIRCUIT.

MONTREAL, 11 septembre 1884.

Coram LORANGER, J.

DENAULT et vir v. PRATT, et PRATT, opp.

Saisie-exécution—Opposition afin d'annuler.

JUGÉ: 10. *Que la saisie-exécution des biens meubles d'un défendeur devient caduque, si le demandeur après avoir saisi ne termine point la procédure dans les délais fixés par la loi.*

20. *Que même le consentement du défendeur et l'engagement formel de sa part que la saisie soit suspendue, afin de lui permettre de s'acquitter par versements consécutifs, ne peut empêcher la saisie de devenir caduque et que le demandeur ne peut ensuite procéder à la vente des effets saisis si les délais ordinaires sont expirés.*

30. *Qu'une opposition afin d'annuler basée sur ce motif sera maintenue, mais sans frais.*

Le 26 février 1884, le demandeur fit saisir par voie de saisie-exécution les biens meubles du défendeur pour la dette et les frais en cette cause, savoir : \$41.65.

Le défendeur se disant incapable de payer toute cette somme en une seule fois, offrit à l'avocat de la demanderesse \$5 par semaine jusqu'à extinction complète de la dette et des frais.

Cette offre fut acceptée, mais à la condition expresse que la saisie ne serait que suspendue, et que si le défendeur faillissait à ses engagements, la demanderesse ferait aussitôt vendre ses effets sans recourir à la formalité d'une nouvelle saisie, ce à quoi le défendeur acquiesça.

Ce dernier fit quelques paiements, mais non aux termes fixés, et se laissa arriérer dans ses versements qui tous devinrent échus. Enfin, le 27 mai 1884, la demanderesse, voulant en finir, fit signifier au défendeur de nouveaux avis et annonça la vente dans les journaux.

En dépit de ses engagements et de sa parole donnée, le défendeur fit une opposition afin d'annuler, basée sur le motif que la demanderesse après avoir saisi, n'avait pas procédé à la vente dans les délais fixés par la loi, et que la saisie était en conséquence caduque et que tous les procédés ultérieurs faits en vertu de cette saisie étaient nuls.

La convention intervenue entre les parties comme susdit, fut prouvée à l'enquête.

La cour, après avoir entendu les parties et délibéré, déclara la saisie caduque, nonobstant la dite convention. Elle maintint l'opposition mais sans frais, vu la conduite équivoque du défendeur dans cette circonstance.

Opposition maintenue.

F. L. Sarrazin, pour l'opposant.

N. Durand, pour la demanderesse.

(J.G.D.)

COUR DE CIRCUIT.

STE-JULIENNE (District de Joliette),

5 décembre 1884.

Coram CIMON, J.

RÉV. J. OUTRETT v. J. CADOT.

Paroisse civile et canonique—Erection et division des paroisses—Dîme.

JUGÉ:—1. *Que lorsqu'une partie d'une paroisse civile et canonique est, par décret de l'Evêque diocésain, dûment détachée et annexée à une paroisse voisine, la dîme est due au curé de cette dernière qui peut la recouvrer en justice, nonobstant que, sur opposition des parties intéressées, les commissaires auraient refusé d'ériger civilement cette nouvelle paroisse qui reste paroisse canonique seulement.*

20. *Que dans l'érection de paroisses canoniques, l'Evêque diocésain n'est soumis qu'à ses supérieurs ecclésiastiques, et que les tribunaux civils n'ont aucun contrôle soit quant au fond, soit quant à la forme des décrets.*

30. *Que la dîme est due pour la subsistance du curé à l'occasion des services spirituels qu'il*

est appelé et tenu de rendre aux fidèles mis par l'Evêque sous sa juridiction et non pour les services civils qu'il rend à l'Etat et que, par suite, c'est la paroisse canonique qui doit la dîme.

PER CURIAM:—Le demandeur allègue que depuis au-delà de trois ans il est curé investi de la cure de la paroisse de Ste-Julienne, y exerçant les fonctions curiales et ayant droit en cette qualité de percevoir la dîme ordinaire des grains récoltés, dans sa paroisse, sur les terres de ses paroissiens catholiques romains; que le défendeur appartient à la religion catholique romaine et qu'il est un des paroissiens du demandeur, cultivant et possédant à titre de propriétaire "une terre de "forme irrégulière située en la paroisse canonique de Ste-Julienne, contenant quatre-vingt-dix arpents en superficie, à la Petite-Rivière, entre Narcisse Mercier et les terres "de la Fourche;" que par un décret canonique de Monseigneur Ignace Bourget, alors évêque de Montréal, en date du 5 novembre 1861, une partie de la paroisse du St-Esprit, communément appelée Petite-Rivière, et amplement décrite et désignée au dit décret pour les fins curiales et canoniques aurait été détachée de la paroisse du St-Esprit et comprise dans la paroisse canonique de Ste-Julienne, en sorte que le défendeur est devenu le paroissien du demandeur pour les fins curiales et canoniques, et en conséquence il est redevable envers ce dernier de la dîme des grains qu'il a récoltés sur la terre susdécrite; et le demandeur réclame du défendeur la dîme pour l'année expirée à Pâques, 1883.

Le défendeur plaide que la paroisse du St-Esprit a été érigée canoniquement et aussi civilement par proclamation du gouverneur en date du 16 décembre 1835; que le décret canonique de Mgr Bourget érigeant canoniquement la dite paroisse de Ste-Julienne fut soumis aux commissaires civils du diocèse de Montréal, le 28 décembre 1861, pour obtenir la reconnaissance civile par la grande majorité des franc-tenanciers de la partie de la paroisse du St-Esprit appelée Petite-Rivière, mais qu'une opposition ayant été faite à l'érection civile par la grande majorité des franc-tenanciers de la partie de la paroisse du St-Esprit appelée Petite-Rivière, les dits commissaires firent rapport au gouverneur que

cette opposition était fondée et que la susdite partie de la paroisse du St-Esprit ne devait pas être comprise dans les limites de la nouvelle paroisse de Ste-Julienne, et en conséquence, cette nouvelle paroisse n'a pas été érigée civilement; que la dîme n'est due qu'au curé régulièrement investi de la cure d'une paroisse canonique reconnue par l'autorité civile suivant la loi; que le décret canonique de Mgr Bourget n'ayant pas été reconnu ni approuvé par l'autorité civile, le demandeur ne peut avoir droit d'obtenir la dîme du défendeur qui la doit légalement au curé de la paroisse du St-Esprit.

Telles sont les prétentions respectives des parties.

Le 18 novembre 1880, Mgr Fabre, évêque de Montréal, a nommé le présent demandeur curé de cette paroisse de Ste-Julienne. Et conformément à cette nomination, le demandeur est en possession de la cure et paroisse de Ste-Julienne, telle qu'érigée canoniquement.

Il appert que le défendeur a payé ses dîmes au curé du St-Esprit autrefois, mais que le curé du St-Esprit en faisait remise au curé de Ste-Julienne.

Le défendeur, à l'audience, par son avocat, a oralement admis que le curé du St-Esprit, a depuis trois ou quatre ans refusé de recevoir la dîme du défendeur parce qu'il considérait qu'elle ne lui était pas due et qu'il ne voulait plus se donner le trouble de la recevoir pour la remettre au curé de Ste-Julienne; et le défendeur a refusé de la payer au curé de Ste-Julienne, parce qu'il prétend qu'il n'est pas son curé, vu que la paroisse n'a pas été érigée civilement; ainsi depuis trois ou quatre ans le défendeur n'a payé aucune dîme.

Il est admis que le défendeur accomplissait ses devoirs religieux ailleurs que dans la paroisse de Ste-Julienne.

Le défendeur admet que la dîme réclamée s'élève à \$3.75.

Aux pages 97-98 du code des Curés, le juge Beaudry dit que celui qui réclame la dîme est tenu de prouver que la paroisse est érigée canoniquement et civilement.

"C'est, dit-il, ce qui a été jugé dans une "cause de Messire Tessier, curé de St-Mathias, contre Michel Tétreau, le 19 février 1838. Le défendeur se défendait de payer

" la dîme à M. Tessier en disant qu'il n'appartenait plus à la paroisse de St-Mathias, " le territoire sur lequel il habitait en ayant " été démembré pour former une nouvelle " paroisse érigée canoniquement et au curé " de laquelle il avait payé ses dîmes. Comme " la paroisse de St-Mathias avait été reconnue " civilement et non l'autre, la cour jugea que " l'ancien curé avait droit à la dîme." C'est là une décision de feu le juge Rolland. A la page 33, le juge Beaudry va même jusqu'à dire " que dans le Bas-Canada, il ne peut y " avoir de paroisse purement canonique. On a " voulu soutenir la prétention, dit-il, que l'évêque pouvait ériger une paroisse canonique sans attendre une requête de la majorité et pour les fins purement religieuses. " Cette prétention ne saurait être reçue."

La question soulevée en cette cause n'est pas nouvelle, comme on le voit; mais bien qu'elle soit fort ardue et très-délicate à décider, nous ne pouvons nous rendre à l'opinion des juges Rolland et Beaudry. Nous dirons d'abord que, dans la province de Québec, l'Eglise Catholique Romaine et l'exercice de sa religion jouissent de la plus grande liberté possible, tellement qu'elle n'a aucune autre restriction que celle que l'Eglise elle-même de son plein gré voudrait bien s'imposer. Inutile pour démontrer cette proposition de refaire un travail qui a déjà été fait plusieurs fois. Cette proposition est devenue de droit public et a été reconnue et sanctionnée plusieurs fois par les tribunaux.

Notre législation se rattache à cette liberté et en est une conséquence nécessaire.

Les tribunaux civils sont tenus de respecter et protéger cette liberté, de lui donner son plein effet. Ils doivent donc respecter les décisions et décrets canoniques de l'autorité religieuse compétente, ce qu'ils ont déjà fait en diverses circonstances; et en conséquence, ils doivent leur donner, lorsque le cas s'en présente devant eux, tous leurs effets. Nos lois civiles doivent donc être interprétées dans le sens de cette liberté religieuse.

La loi civile que nous avons au sujet de l'érection des paroisses, est contenue en le chapitre 18 des S. R. B. C. Que dit-elle? Sec. 5: " Toutes les matières relatives à l'érection des paroisses ou à leur division, " seront réglées et décidées par l'Evêque

" Catholique Romain ou la personne administrant le diocèse dans lequel il y a lieu " d'agir, et par les commissaires nommés " pour le dit diocèse."

Sec. 8: " Toutes les fois qu'il s'agit d'ériger " une nouvelle paroisse, de démembrer et " subdiviser quelques paroisses.... ou de " changer et modifier les bornes et démarcations de paroisses déjà établies suivant la " loi.... alors dans tous les cas, sur la requête d'une majorité des habitants francs-tenanciers désignés en la dite requête.... " la dite requête présentée à l'Evêque Catholique du diocèse.... les autorités ecclésiastiques procéderont selon les lois ecclésiastiques et l'usage du diocèse au décret définitif d'érection canonique de toute paroisse...."

Puis, ce statut dit que sur ce décret canonique, on pourra prendre action pour obtenir du gouverneur une proclamation (Sec. 15) pour l'érection de TELLE PAROISSE pour les fins civiles et pour la confirmation ou l'établissement et reconnaissance des limites et bornes d'icelles.

Et le Juge Beaudry a écrit très justement à la page 36, au sujet de l'érection canonique de la paroisse, ce qui suit :

" L'autorité ecclésiastique jouit à cet égard " de son indépendance. Il lui est loisible de " refuser l'érection canonique, sans que les " tribunaux puissent lui en demander compte. " Dans ce cas, le seul recours est devant l'autorité supérieure ecclésiastique....

" Les tribunaux ne peuvent non plus intervenir sous le prétexte que, dans l'érection canonique, l'autorité ecclésiastique a procédé irrégulièrement ou sans droit. Il y a encore en ce cas recours à l'autorité ecclésiastique supérieure, s'il s'agit des effets canoniques, et au gouvernement civil, s'il s'agit des effets civils."

Les juges Bowen et Duval ont, le 7 avril 1852 (2 L. C. R. 293, *ex parte Guery*), jugé que le décret canonique est une procédure purement ecclésiastique, hors la juridiction des cours civiles.

Et si le gouverneur refuse d'émettre cette proclamation pour ériger cette paroisse canoniquement pour les fins civiles, le statut ne dit pas (ce que d'ailleurs, il n'avait pas compétence à dire) que dans ce cas, le décret ca-

nonique sera nul. Non, la paroisse restera paroisse canonique, si l'évêque n'a pas inséré dans son décret la condition qu'il ne sera valide que, si la paroisse est ensuite érigée civilement, et s'il le maintient. Elle ne sera pas paroisse pour les fins civiles; mais elle sera bien et dûment paroisse pour toutes les fins canoniques, spirituelles.

Le décret de Mgr Bourget, qui a érigé la paroisse de Ste-Julienne, ne contient pas de condition; et l'évêque l'a mis en force, à effet, et le maintient.

Ce statut—chap. 18, S. R. B. C.—n'enlève et n'a pu enlever aux évêques aucun pouvoir qu'ils ont de droit canon ou par l'autorité du St-Siège. Il ne doit pas être interprété comme prétendant contrôler l'autorité religieuse; mais c'est l'autorité civile qui dit que quand l'évêque aura, sur la requête de la majorité des francs-tenanciers, procédé à l'érection canonique d'une paroisse, alors si elle (l'autorité civile) juge à propos qu'il est de l'intérêt du civil de donner à cette paroisse canonique certains effets civils, dans ce cas le gouverneur lancera une proclamation à cet effet. Mais de là, on ne peut conclure que l'autorité civile a prohibé la paroisse canonique, ou prétendu lui refuser ses effets canoniques.

L'évêque a pleine liberté d'organiser son diocèse comme il l'entend (sous le contrôle de l'autorité religieuse supérieure) pour toutes les fins spirituelles, et, pour cet effet, ses décrets sont regardés comme valides par les tribunaux civils. Autrement, la liberté de l'Eglise et l'exercice de sa religion ne seraient pas complets; car si l'autorité civile refusait à l'évêque le droit d'avoir des paroisses purement canoniques, et qu'elle ne voulût pas la reconnaître civilement, alors l'évêque se trouverait dans l'impossibilité d'organiser librement son diocèse pour le bien des âmes. Or de droit public, l'Eglise a toute la liberté voulue.

Nous sommes donc d'avis que l'Evêque peut créer des paroisses canoniques pour les fins spirituelles, et ces paroisses ont tous leurs effets spirituels, et cela, sous la protection au besoin des lois civiles et des tribunaux civils.

On a prétendu que ce statut, chap. 18, S. R. B. C. était une espèce de concordat

entre l'autorité religieuse et civile, et que l'autorité religieuse l'avait *accepté* et était tenue de ne maintenir aucune paroisse catholique, si l'autorité civile refusait de l'ériger pour les fins civiles. Nous ne pouvons adopter cette opinion.

Le statut n'a aucune disposition nous faisant voir qu'il est de la nature d'un concordat; il n'y a aucune preuve que l'autorité religieuse l'ait accepté pour gêner son action dont la liberté lui est assurée de droit public.

De plus, une preuve que l'autorité religieuse n'a pas voulu accepter ce statut comme restreignant sa liberté, c'est qu'elle procède, dans le cas actuel, à exiger que cette paroisse canonique de Ste-Julienne ait tous ses effets spirituels. De même qu'à presque toutes les sessions, la législature passe des lois—de sa propre initiative et sans le concours de l'autorité religieuse—disant que *telle partie détachée de telle paroisse canonique et civile est détachée de la dite paroisse et annexée à une autre paroisse pour les fins parlementaires, judiciaires, municipales, scolaires et d'enregistrement*: de même l'autorité religieuse a le droit—de sa propre initiative et sans le concours de l'autorité civile—de dire (et elle est la seule autorité compétente à le dire): *les limites de telles paroisses telles que reconnues civilement ne conviennent plus pour les fins spirituelles*; il est de l'intérêt des âmes que les fidèles soient aujourd'hui groupés autrement et qu'une partie de cette paroisse en soit détachée et formée par elle-même ou unie à un autre territoire—pour le bien des âmes—une paroisse canonique pour les fins spirituelles. Où est le texte de loi encore en force qui refuse ce droit, ce pouvoir, ce devoir à l'évêque? Nous n'avons pu le trouver.

Nous sommes donc d'avis que la cure et paroisse de Ste-Julienne érigée canoniquement par Mgr de Montréal—bien qu'elle n'ait pas été érigée pour les fins civiles—reste paroisse canonique pour toutes les fins spirituelles, c'est-à-dire, en employant les termes mêmes du décret canonique, "pour être la dite cure et paroisse de Ste-Julienne entièrement sous notre (l'évêque) *jurisdiction spirituelle*, à la charge par les curés ou desservants qui y seront placés par nous ou par nos successeurs, de se conformer aux règles de la discipline ecclésiastique en usage dans ce dio-

“cèse, spécialement d'administrer les sacrements, la parole de Dieu et les autres secours de la religion aux fidèles de la dite paroisse, enjoignons à ceux-ci de payer aux curés ou desservants qui y seront placés les dîmes et oblations telles qu'usitées et autorisées en ce diocèse, de leur porter respect et obéissance dans toutes choses qui appartiennent à la religion et qui intéressent le salut éternel.”

Ce décret n'empiète nullement sur le pouvoir civil. Naturellement cette paroisse canonique de Ste-Julienne n'est pas paroisse pour les fins civiles. Mais qu'entend-on par fins civiles? Du moment qu'une paroisse est érigée pour les fins civiles, elle devient, de plein droit, dans certains cas, une corporation municipale distincte, ayant tous les pouvoirs et les devoirs des corporations municipales; il en résulte aussi des droits politiques pour les habitants de ce territoire qu'ils pouvaient ne pas posséder auparavant; il en résulte aussi certains effets concernant la milice, les cadastres, les élections parlementaires, la vente judiciaire, etc., etc.; et quant à ces droits et devoirs politiques et civils, il peut être de l'intérêt de l'état civil ou des citoyens habitant le territoire érigé en paroisse canonique, que ce territoire ne soit pas érigé en paroisse civile. Ainsi l'évêque ne peut blâmer le gouvernement, lorsqu'il refuse d'ériger pour les fins civiles une paroisse canonique; ce refus n'empêche pas la paroisse canonique d'avoir des effets spirituels. Nos statuts—nous l'avons dit—contiennent nombre de lois qui ont changé les limites de nombreuses paroisses pour ces fins civiles. Il est évident qu'il y a des cas où la paroisse doit avoir des limites différentes, dans l'intérêt respectif du civil et du spirituel, pour les fins civiles et les fins spirituelles.

Or la paroisse canonique de Ste-Julienne ne peut avoir aucun effet quant aux droits civils et politiques dont nous avons parlé. Mais la dîme et son recouvrement devant les tribunaux civils, sont-ce là des droits civils ou des effets civils qui ne peuvent résulter que de la paroisse civile?

Dans la Province de Québec, la dîme est due par les Catholiques romains à leur curé, ou au prêtre député auprès d'eux (le desservant) par l'évêque pour y exercer les fon-

tions curiales; elle est due de droit commun, et elle est reconnue dans notre code civil; son recouvrement s'en fait devant les tribunaux civils. La dîme, dit Pothier, louage, No. 213, “c'est une louable coutume qui, par la force de la coutume, a passé en obligation.”

Pourquoi la dîme est-elle due? C'est pour la subsistance du curé ou du prêtre chargé de faire les fonctions curiales, et cela à l'occasion des services spirituels qu'il est appelé et tenu de rendre aux fidèles mis par l'évêque sous sa juridiction.

Guyot, repert. vo. dixmes, p. 13, dit: “*Droit commun*, les dîmes de tous les fruits que produit le territoire d'une paroisse appartiennent au curé, parce qu'on les destine à ceux qui sont chargés de la conduite des âmes. “*Feérière*, vo. Dixmes: “Les dîmes sont une certaine portion de fruits que nous recueillons... qui est due à Dieu en reconnaissance du suprême domaine qu'il a sur toutes choses, et que l'on paie à ses ministres pour aider à leur subsistance.”

Il est certain que la dîme n'est pas due pour les quelques devoirs civils que l'Etat peut exiger du curé.

La dîme est donc due à l'occasion des fonctions curiales spirituelles. En quoi consistent ces fonctions curiales? Le décret canonique les résume par ces mots: “spécialement d'administrer les sacrements, la parole de Dieu et les autres secours de la religion aux fidèles de la dite paroisse,” et c'est pourquoi le décret ordonne à ces fidèles de payer la dîme au curé de la paroisse canonique de Ste-Julienne et de lui obéir en toutes choses qui appartiennent à la religion et au salut éternel. Le curé ou desservant ne peut recevoir ces pouvoirs spirituels que de l'autorité religieuse.

Il n'y a que l'évêque qui crée la cure; il n'y a que lui qui fait le curé. L'Etat, dans la Province de Québec, n'a rien à voir à cela. Une paroisse que l'Etat érigerait—comme par exemple, par un acte de la législature—sans qu'elle soit paroisse canonique, pourrait bien avoir tous les effets civils, mais ne serait pas une cure. Le curé n'est que pour les fins de la paroisse canonique, et l'érection civile de la paroisse n'ajoute aucun pouvoir spirituel ou religieux au curé; ce n'est que pour les fins spirituelles qu'il est curé.

Pourquoi faudrait-il que le prêtre député par l'évêque pour être curé d'une paroisse canonique, ne le serait qu'en autant que ce territoire serait paroisse civile? Nous n'en voyons pas la raison dans notre province, et nous ne trouvons pas que le droit civil exige cela. Dans d'autres pays il a pu ou il peut en être autrement, sous une différente constitution, sous un différent droit public, ou sous autres circonstances lorsque l'Eglise n'a pas ou n'avait pas la pleine liberté dont elle jouit ici, ou bien lorsqu'elle a fait des concordats. Mais ici, l'Eglise n'a pas besoin de concordat, elle n'en a pas fait, et aucun texte de loi n'exige que le curé, pour qu'il ait droit à la dîme, le soit d'une paroisse érigée civilement. Nous disons donc que le prêtre député par l'évêque pour faire les fonctions curiales spirituelles dans une paroisse canonique est, *aux yeux mêmes de la loi*, le propre curé des fidèles de ce territoire pour les fins de ses fonctions curiales spirituelles. Et ce curé devient alors le créancier de la dîme, puisque la dîme est due à l'occasion des fonctions curiales spirituelles.

Le défendeur, vu le décret canonique érigeant la paroisse de Ste-Julienne, et comme sa terre est incluse dans cette paroisse, a donc cessé, en ce qui regarde les fins de ses fonctions curiales spirituelles, d'être le paroissien du curé du St-Esprit, et est devenu, pour ces fins, le paroissien du curé de la paroisse canonique de Ste-Julienne. C'est celui-ci qui a juridiction spirituelle et canonique sur lui et non le curé du St-Esprit.

L'évêque de Montréal, par le décret canonique et par la lettre de nomination du demandeur comme curé de la paroisse de Ste-Julienne, a donné au demandeur le droit de percevoir la dîme du défendeur comme de tous les autres fidèles du territoire de la paroisse canonique de Ste-Julienne, et a ordonné au défendeur comme à ses autres fidèles de lui payer la dîme et de considérer le demandeur comme leur curé. Le curé du St-Esprit n'est plus le curé du défendeur; celui-ci n'est plus sous sa juridiction spirituelle, et le curé du St-Esprit ne doit plus au défendeur les devoirs spirituels de curé. C'est le demandeur qui doit ces devoirs de curé au défendeur. Puisque la dette de la dîme est due au curé à l'occasion des fonctions curiales spirituelles et que c'est le demandeur qui est le curé du défendeur, c'est à lui que cette dette est due. Cette dette est de droit commun, reconnue civilement, et le demandeur peut alors la recouvrer par les moyens des tribunaux civils.

La dette de la dîme peut être de droit divin; nous n'avons pas compétence à le dire; mais le paiement en est également ordonné par le droit civil, mais c'est à l'autorité religieuse à la percevoir.

Les tribunaux civils lui prêtent leur con-

cours pour cela, et voilà tout. C'est l'autorité religieuse seule qui, par l'organisation libre des diocèses, pour les fins spirituelles, fait le curé, et ainsi détermine la personne qui a droit à la dîme et qui peut en poursuivre le recouvrement. La dîme est si peu un effet qui ne peut découler que de la paroisse civile, qu'elle est due, dans ce pays, des fruits de toute terre, même avant qu'elle fasse partie d'un territoire érigé en paroisse canonique. C'est ce que M. le juge Beaudry reconnaît lui-même, à la page 99: "La dîme est également due et peut être exigée par les missionnaires dans les lieux qui n'ont pas encore été érigés en paroisses."

La terre du défendeur devait donc la dîme avant même que le territoire où elle est, fut érigé en paroisse.

Mais on dit que le demandeur n'a rendu aucun service au défendeur, attendu que celui-ci a rempli ses devoirs religieux ailleurs que dans la paroisse canonique de Ste-Julienne, et que le défendeur ne lui doit rien. Ce raisonnement est absolument faux. Un fidèle ne peut s'exempter de payer la dîme au curé que l'évêque lui donne, en allant faire ses devoirs religieux dans un autre endroit. S'il le pouvait, il faudrait en conclure que le paroissien qui ne requiert aucun service de son curé, ne lui devrait pas la dîme. A quel état de choses épouvantable nous conduirait ce système! Nous croyons donc que, par notre droit, le défendeur est tenu de payer sa dîme au demandeur.

Ce n'est pas sans quelque hésitation que nous en sommes venu à cette conclusion, car nous avons un grand respect pour l'opinion de juges aussi éminents que MM. Rolland et Beaudry.

Nous connaissons aussi que des juristes éminents ont partagé l'opinion de ces deux juges, mais, enfin, après avoir mûrement délibéré, étant tenu de juger suivant les dictées de notre propre jugement et ce que nous trouvons être le droit dans notre province, nous sommes obligé de donner gain de cause au demandeur.

Nous sommes heureux de savoir que notre décision pourra être soumise à des tribunaux civils supérieurs, et aussi le défendeur pourra encore avoir son recours devant l'autorité religieuse compétente.

En conséquence, cette Cour condamne le défendeur à payer au demandeur la somme de \$3.75, avec intérêt du 21 mars 1884 (date de la signification de l'action) pour la dîme des grains récoltés par le défendeur sur la terre susdécrite pour l'année expirée à Pâques, 1883, et les dépens distracts à M^{re} Truesdell, proc. du demandeur.

E. Truesdell, avocat du demandeur.

C. P. Charland, avocat du défendeur.

(J.J.B.)

GENERAL INDEX TO SUBJECTS.

VOL. VII.

	PAGES		PAGES
ABSENCE OF LEGATEE.....	95	ASSESSMENT, On whom it falls.....	378
ACTION, for assault and battery after con- viction.....	3	When assessment roll comes into force.....	260, 263
<i>Pro socio</i> , Pleadings.....	42	For cost of improvement in the City of Montreal.....	122
<i>En déclaration de paternité</i> , Proof.....	149	ASSIGNMENT IN TRUST, Powers of trustee..	182
Of account.....	239	Power to sell on credit not a frau- dulent preference.....	391
<i>Qui tam</i> , Affidavit.....	390	ATTORNEY, Pretending to act as.....	353
ACTIONS, Publication of number of suits instituted by attorneys.....	9	AUTREFOIS ACQUIT.....	356
ADMINISTRATION OF THE LAW in England.....	289	AVEU, As to voluntary deposit.....	32
ADVOCATE, Privilege of.....	41, 44		
Opinion given " <i>en voyage</i> ".....	176	BAILIFF, Fees of, where attorney has not distraction of costs.....	7
Of Quebec bar, Action for profes- sional services as counsel before Commission....	242, 265, 278, 287, 298	May make service upon his rela- tions.....	68
AFFIDAVIT under C.C.P. 834.....	109	BAILMENT, GRATUITOUS.....	355
<i>Qui tam</i> action.....	390	BANKING ACT—Director giving himself an undue preference.....	228, 395
AGENCY, When agent to sell may warrant.....	136	BANK, Liability of Bank of Montreal to pay Internal Revenue Tax in U.S.....	267
Trustees carrying on business of insolvents.....	210	BANK IN LIQUIDATION, Contributory.....	346
Factor of foreign principal.....	213	BANKS AND BANKING.....	388
AGRICULTURAL SOCIETIES, Organisation of.....	139	BANKRUPTCY ACT.....	296
Choice of a place for exhibitions..	139	BAR, General Council of, Resolutions by	134
AMERICAN LAW JOURNAL.....	176	BAR EXAMINATIONS.....	224
APPEAL does not lie from resolution of County Council.....	71	BELT CASE, The.....	160
Business in.....	73, 162, 297, 397	BENJAMIN, The late Mr. J. P.....	155
From the Circuit Court—Is it obli- gatory to file <i>factums</i> ?.....	97	Mode of charging fees.....	200
From interlocutory judgment.....	114	Will of.....	232
To Circuit Court from decision of County Council.....	158	On keeping old papers.....	296
APPEALS, Limitation of.....	321	BET ON HORSE RACE, seizable by judgment creditor in hands of third party..	228
Register.....	399	Action by agent for.....	296
ARBITRATORS, Proceedings of.....	70	BETHUNE, Q.C., (JAMES), The late.....	405
Immunity of.....	306	BILLS, Promotion of, in England.....	96
ARCHIVES of Province of Quebec.....	283	BILL OF LADING, Assignment of.....	67
ASSAULT AND BATTERY, Civil action after conviction before justices.....	3	BLACK CAP, The.....	3
ASSAULT, INDECENT, By physician upon patient.....	278	BONDS (Railway), Default to give up.....	30
		BOUNDARY QUESTION.....	17, 202, 249, 341

Report of Judicial Committee of Privy Council	281	COLORIED MEN as Court officials.....	48
Review of Judgment of Privy Council	313	COMMISSIONS, Parliamentary	351
BOUNDS. Identity of lot, Possession in good faith	218	COMMUNITY, Exclusion of.....	401
BRAIN WORK	16	COMPANY, Subscription for shares in company about to be incorporated, Change of name	50
BREACH OF PROMISE	389	Discretion of Court as to granting injunction	60
"BREAD WINNERS," Authorship of.....	152	Service of summons on	61
BRITISH COLUMBIA LAW REPORTS	404	Injunction to prevent annual meeting	85
BROKER, Pledge of stock, Sale by pledgee..	355	Forfeiture of shares, Sale of confiscated shares	352
BUILDING & INVESTMENT ASSOCIATION, Incorporation of	10	Sale of shares, Election of directors	353
BUILDING SOCIETIES, Confiscation of shares	360	Insolvent, Proceedings by liquidator of	359
Minor may hold shares	360	Mandamus, Annual meeting, Duty of President	368
BUNTIN, ALEX., Sentence in case of.....	395	COMPENSATION, Claim of universal legatee, Doctor's bill, etc.....	109
BUSINESS FAILURES in Canada.....	350	Of damages	111
BYLES, The late Sir John	87	Of Crown claims.....	147
		Of husband's claim by goods sold to wife (<i>séparée de biens</i>).....	338
CANADA and the Mother Country.....	2	CONFLICT OF LAW, Legacy to alien female infants married.....	72
Foreign views of.....	33	CONSOLIDATION OF STATUTES	358
CANADA GAZETTE NOTICES..... 348, 356,	364, 388, 404, 412	CONSTITUTIONAL CASES before the Privy Council	65
CAPIAS, Probable cause for issue of.....	44	CONSTITUTIONAL POWERS, by J. Travis....	234
Malicious issue of.....	156	CONTEMPT OF COURT.....	348
Exception à la forme.....	382	CONTRACT, Offer of reward for information Interpretation of.....	7
Intent to defraud.....	398	Responsibility of mandator.....	29
CARTER licensed by municipality of his domicile	79	Subscription for shares in company Measurement of stone	50 307
CARRIERS, Right of ejection	355	CONTRACTOR, Negligence of	15
Liability of connecting carriers... ..	356	CONTRAINTS PAR CORPS for deterioration of property under seisure	90, 99
CAT, Responsibility for acts of.....	304	CONTRIBUTORY.....	346
CENSUS STATISTICS	113	CONTRIBUTORY NEGLIGENCE	396
CHANGE OF LEVEL OF STREET, Damages ..	383	CONVICTION for assault; plea in bar to civil action	3
CHARTER-PARTY, Demurrage	102	COPYRIGHT, Author of photograph	112
CHINESE WALL, A modern	129	COSTS, Collection of bailiff's fees.....	7
CINCINNATI RIOTS	108, 176	Where tender only applies to one part of the demand	110
CIRCUIT COURT, Montreal, Business of....	16	Privilege for.....	133
CITY PASSENGER RAILWAY	193, 194	Action of account.....	239
CODIFICATION in New York State.. 33, 146,	147, 235	Petition for appointment of sequestrator	246
COINS, Melting down	304	A fight for	278
COLBRIDGE, Chief Justice, on society journals	137		
At Mount Vernon.....	152		
Visit of, to America	247		
COLBRIDGE LIBEL CASE.....	401		
COLLECTOR pretending to act as attorney..	353		
COLONIAL QUEEN'S COUNSEL, Status of....	321, 341		
COLONIAL ATTORNEYS' RELIEF BILL	341		
COLONIAL DEPENDENCE.....	357		

COTTON FUTURE NOTES	16	DIVORCES for the working classes.....	200
COUNSEL, Privilege of.....	41, 44	DOCTOR, summoned to attend person taken suddenly ill.....	242
COUNSEL FEES, Action for. by Advocates of Quebec Province	225, 241, 242, 265, 270, 287, 298		
COUNSEL IN ENGLAND, Position of.....	297, 396	EDITORS, Ages of.....	96
COUNTY COUNCIL, Powers of.....	63	EDUCATIONAL INSTITUTION, Liability to pay taxes	26
Resolution of, not appealable.....	71	ELECTION ACT, (CANADA)—Railway pass..	152
By-law of, fixing permanent place for agricultural exhibitions	139	Deposit in action for several penalties.....	178
COUNTY COURT JUDGES, Rank and precedence of	273	Intimidation—Corrupt practice... ..	220
COURTS, Disturbance of, by external noises	316	Corrupt practice.....	401
COURT OF REVIEW, Progress of business in	351	ELECTION ACT (Quebec contested,) of 1875, Corrupt practice—Counter petition	186
CREMATION IN ENGLAND	161	Delay—Answer to petition—Deposit —Counter petition.....	378
CRIMINAL PROCEDURE, Indictment for perjury	247	Intervention	359
CRIMINAL LAW, Refusal of husband to provide necessities	322	Ballot paper.....	414
CRIMINALS, Execution of.....	397	EMERTON on Interpretation of wills.....	359
CRITICISM OF MAGISTRATES.....	316	EMPLOYER, Responsibility of, for fault of person under his control.....	32
CROWN RIGHTS, Compensation	147	ENO CASE.....	208, 216
CROWN, Privilege of	389	EQUITY, A Phase of	289
CROWN TIMBER LICENSE, Sale of.....	41, 46	EUSTON DIVORCE SUIT.....	145
CUMULATIVE SENTENCES.....	247	EVASION of the law.....	136
CURATOR, Mother appointed curatrix to absent son	70	EVIDENCE, Admission as to receipt of deposit	32
CUSTOM OF PORT	102	Parol, against authentic act.....	39
		Bill to amend the law of.....	81
DAM.—See SERVITUDE.		Of wife on trial of husband for neglecting to provide.....	82
DAMAGES, Assessment of.....	71	Commencement of proof—Individuality of <i>œcu</i>	235
Unnecessary severity in test case..	79	Paper written by prisoner's wife by his direction.....	270
Malicious issue of capias.....	166	Drunkenness; intent.....	356
Remarkable action for.....	257, 259	Examination of Garnishee.....	368
For malicious prosecution.....	277	Proceedings in Criminal prosecution	407
Injury caused by dog.....	379	EXECUTION, Fees of bailiff.....	96, 102
Measure of	396	Omission to give credit for money paid on account.....	174
DAY, The late Mr. Justice	48, 112	Sale of moveables, Error in advertisement of sale.....	266
DEFAULT, Putting in.....	55, 59, 407	EXECUTION OF JUDGMENT, Provisional ...	292
DELAISSEMENT, Reservation of buildings erected on the property by defendant	90, 99	Seizure lapsing.....	415
DEMURRAGE, Loading "with all dispatch."	102	EXECUTION OF CRIMINALS	193
DEPOSIT, Admission of defendant.....	32	EXECUTIONS in England and Wales	231
DÉPLACEMENT	182	EXECUTOR, Removal for cause.....	65
DETECTION OF CRIME.....	296	EXECUTOR removed from office, Inscription in Review by.....	346
DETERIORATION OF PROPERTY under seizure.	90, 99		
DISCHARGE, Interpretation of.....	277		
DISORDERLY HOUSE, Keeping a.....	258		
DIVORCE ACT in France.....	209, 248, 273		
DIVORCE, Jurisdiction.....	372		

EXHIBITS, The tax on	405	HARD LABOR, Power of Provincial Legis-	
EX PARTE STATEMENTS, Publication of....	9, 241	lature to impose	49
EXPERTS, Reference to	294	HERBERT, Mr. Jesse, Anecdote of.....	264
EXPERT, Appointed to determine sanity of		HODGE CASE, Reference by Lieut.-Govern-	
person confined as a lunatic....	330	nor of Ontario to decision of	
EXPROPRIATION, A curious illustration of..	348	Privy Council	34
EXTRADITION LAW	208, 216	HOLIDAYS, Necessity of, to brain workers.	248
EXTRADITION, The Eno Case	226, 360	HOMICIDE FROM NECESSITY.....	321, 375,
EXTRADITION ACT OF 1877, False entries..	360	381, 388
		HOMICIDE, Extenuation of	356
FACTOR of foreign principal	213	HORNBY, Sir Edmund, Ghostly Visitation	
FACTUM IN APPEAL, Taxation of.....	90	of	271
FACTUMS, in appeals from the Circuit Court		HOUSE OF COMMONS, England, Ages of	
FAILURES, MERCANTILE, in the Dominion..	8	Speakers.....	104
FALSE PRETENCES, Suspension of Examina-		HOUSE OF LORDS, R.C. priest in	296
tion	371	HOWELL on Naturalization	358
Statement as to title	385	HUBERT, R. A. R., The late	200
FAMILY COUNCIL, Composition of	359	HUSBAND AND WIFE, Wife excluding hus-	
FAWCETT, The late Postmaster-General ..	365	band from her house	1
FEDERAL AND LOCAL JURISDICTION.....	10,	Married Women's Property Act... 101	
.....18, 25, 49, 68, 171,	201	Abandonment by wife of mari-	
FEMALE, refused admission to the Bar at		monial domicile.....	311
Turin	16	Refusal of husband to provide	
FOOT PASSENGERS, Rights of	348	necessaries.....	322
FRANCE AND CHINA, Relations of	320	Husband's claim compensated by	
FRASER INSTITUTE, The.....	330	goods sold to wife <i>séparée de</i>	
FRAUDULENT PAYMENT by insolvent.....	274	<i>biens</i>	338
FREIGHT, Goods damaged in unloading... 401		Husband responsible for medical	
FREIGHT, Goods damaged in unloading... 401		services rendered to wife <i>séparée</i>	
FREMONT's Compendium of Dominion laws	74	<i>de biens</i>	338
FRIENDLY SUITS	98	HYPOTHECARY CREDITOR not collocated in	
		report of distribution, Rights of.	130
GAME IN COURT.....	56		
GAMING, Loan to person playing cards....	326	IMPERIAL COURT OF APPEAL	265
GARNISHEE, Bound to answer questions		IMPRISONMENT, Does power to impose im-	
touching engagement of defen-		prisonment imply power to im-	
dant.....	368	pose hard labor?.....	169, 177
GARNISHMENT, Effect of judgment; on de-		INCIDENTAL DEMAND	42
claration of Garnishee.....	62	INJUNCTION to restrain from voting on	
GIROUARD, Q.C. (Mr.), Letter to Attorney-		shares, Discretion of Court	60
General	283	Delays for appearance and pleading	62
GLASSE, Mr., and Vice-Chancellor Malins.	289	To prevent annual meeting	85
GOVERNMENT BONDS, Premium payable on		Against signing contract.....	114
chance	305	Interlocutory order.....	292
GOWNS FOR JUDGES	73	INSANITY, The case of Mrs. Weldon.....	153
GOWN DISPUTE	366, 372	INSCRIPTION EN FAUX	39
GRANDPHE, Deputy Clerk of Appeal.....	48	INSCRIPTION FOR ENQUETE.....	69, 390
GUARDIAN, Fees of.....	96, 102	INSOLVENCY LEGISLATION, Montreal Board	
		of Trade on	71
HAGARTY, Chief Justice, appointed Chief		INSOLVENT ACT OF 1875, Contestation of	
Justice of Ontario.....	152	validity of assignment.....	108

INSOLVENT, Payment by, in fraud of creditors	274	KENTUCKY TRAGEDY—Suicide of Judge	
Claim not scheduled	414	Beid.....	233
INSULT, Peculiar action of damages for, 257, 259		KISS, not legal consideration.....	248
INSURANCE COMPANIES, Taxation of, by local legislature	171		
INSURANCE, Mutual Insurance Company, Cash Premium System, Extra Assessment	226	LABORER, Designer not a.....	354
INSURANCE, COMPULSORY, by the working classes.....	328	LADY TAX-PAYERS	216
INSURANCE POLICY, Agreement to assign ..	355	LARCENY, Peculiar case of.....	136
INSURANCE (Fire), Conditions of policy ..	379	LARCENY BY BAILNE.....	409
Transfer, Forfeiture.....	379	LAW AND LAWYERS in Belgium.....	161
Introduction of new partner into firm	412	LAW FEES in 1883.....	152
Marine	401	LAW REFORM in England	233
INTEREST PUZZLE, An	3, 7	LAW REPORTS, A System of.....	329
INTERLOCUTORY JUDGMENT, Appeal from ..	114	LAWYER'S LETTER, Fee for.....	383
INTERMENTS, Space required for	136	LAWSON, Mr. Justice, and Dwyer Gray....	56
IRVINE (Geo.), Q.C., Appointed Judge of the Vice-Admiralty Court.....	152	LEASE of land on shares, Prohibition to sublet	368
		LEGACY, Conditional, Absence of legatees.	95
JAPAN, A peerage for	356	LEGAL AUTHORSHIP, Rewards of.....	33
JOURNALS for special vocations.....	56	LEGAL BUSINESS in England, Arrears of. 298, 357	
JOURNALISM, Number of newspapers and periodicals	136	LEGISLATION of 1884.....	136
JUDAH, Mr., Trial of	396	LEGISLATION at Quebec.....	208
JUDGES in GOWNS	78	LEGISLATORS, The sins of.....	151
JUDGES AND RAILWAY PASSES	89, 209	LEGISLATOR, The modern.....	185, 216
JUDGE'S Ghost story	258, 271	LEGISLATURE, Powers of.....	18, 25
JUDICIAL INDEPENDENCE	2	Power to tax insurance companies.	171
JUDICIAL TOPICS in England.....	9	Does power to impose imprisonment imply power to impose hard labor	169, 177
JUDICIAL ADMISSION	32	LESSOR AND LESSEE, Rent not yet due, where	
JUDICIAL SALARIES in the Colonies.....	48	lessee becomes insolvent.....	15
JUDICIAL BREVITY.....	109	Responsibility of proprietor.....	55
JUDICIAL SALE, Possession	119	Privilege of lessor.....	77
JUDICIAL STYLE	225	Fire in leased premises.....	172
JUDICIAL CHANGES in England	249	Opposition by sub-tenant, as to effects exempt from seizure.....	277
JUDICIAL CRITICS	249	Renunciation by tenant to privilege of exemption from seizure.	278
JUDICIAL WORKSHOPS.....	349	Saisie gagerie par droit de suite...	287
JUDICIAL REMINISCENCE, A.....	363	Act relating to, does not apply to lease of moveables.....	361
JURISDICTION. <i>See</i> FEDERAL AND LOCAL JURISDICTION		Change of shed to stable.....	384
SUMMONS	78	LIBEL, Privileged communication.....	195
JURY DUTY, Persons liable to.....	248	Publication of petition in suit before hearing not privileged.....	225
JURY, Misconduct of.....	389	Damages <i>insaisissables</i>	264
JUSTICE OF THE PEACE, not responsible for illegal issue of warrant, without malice.....	325	Identity of person libelled.....	303
		In a plea, when action therefor may be instituted.....	353
		Damages for.....	361
		LIBERTY OF THE PRESS abused.....	121

LICENSE ACT of 1878 (Quebec).....	68, 383	MASTER AND MARINER, Ill treatment of seaman	366, 369
LICENSE FEES in 1883	152	MEDIEVAL LAW SUITS	113
LIQUOR LICENSE ACT of 1877, (Ontario)...	18, 25	MEDIATORS, Proceedings of.....	70
LITERARY PROPERTY, Protection of lectures	304	MERCHANT SHIPPING ACT, Ill treatment of seaman	369
LITIGATION IN PARIS	373	MEREDITH, Chief Justice	129
LIVING IN CHAMBERS	339	Resignation of	289
LOAN, to a person playing cards	326	MERRY, The late J. W.	120
LORANGER, Hon. T.J.J., upon the Federal .. Constitution	147	MILITIA SERVICE—Allowance for annual drill	224
LORRAIX, on Lease and Hire	404	MINOR may hold shares in Building Society	360
LOTTERY, "Lucky balls"	328	MIRROR OF JUSTICE, Title of	48
LUNATIC, Petition for discharge of person confined as—Reference to Expert	330	MONEY FOUND, Appropriation of	396
LYNAM CASE, The	329, 330, 413	MONTREAL, CITY OF, Taxation of educa- tional institutions	26
LYRICS OF THE LAW, by J. G. Croke.....	146	Assessment for cost of improvement	122
		Contestation of election of Alder- man	250
McCARTHY ACT Referred to the Supreme Court	201	Keeping a disorderly house in....	258
MACDONALD, Sir John A., Distinction of K.G.C.B. conferred on	380	When special assessment roll comes into force, Prescription	260, 263
MACKAY, Mr. Justice, Law Library of....	147	Contested municipal election	360
MACLAREN, J. J.	74	Person liable for assessment	378
Banquet to	152	MONTREAL LAW REPORTS	349, 381
MACMASTER, (D.) Q. C., on the Liquor License Act of 1883	147	MONTREAL, Views of, abroad	138
MAGNETIC GIRL in Court	232	MOUSSEAU, Mr. Justice, Appointment of..	48
MAIDEN SPEECH, A	200	MOUSSEAU COMMISSION, The	249, 251
MALICIOUS PROSECUTION, Action for; Essential averments	104	MOVABLES, Lease of	361
Damages for	277	MUNICIPAL CODE, Rescission of procès- verbal	63
MANDAMUS, to compel railway company to maintain crossings	6	Art. 561	68
When not necessary	286	Art. 1061	71
MANDATE, Responsibility of mandator....	29	Art. 583, Carter licensed by muni- cipality of his domicile	79
Authority of agent	40	Selection of place for exhibition of Agricultural Society	139
MANITOBA LAW JOURNAL	75	Minutes of proceedings of Council	139
MANITOBA, Judicial statistics of	120	Art. 775, Nullity of procès verbal, Acte de répartition, Vente au rabais	327
MANISTY, Mr. Justice, on Law Reform in England	233	Art. 793	318
MARITIME LAW, Peril of sea	15	Collection Roll	390
MARRIAGE IN FRANCE	16	Resolution of County Council	401
MARRIED WOMEN'S PROPERTY ACT in England	1, 101	Art. 82	407
MARRIED WOMAN—See HUSBAND AND WIFE.		MUNICIPAL CORPORATION, Change of level of street	383
MASSON, L.B., appointed Lt. Governor of Quebec	372	MUNICIPAL ELECTION in Montreal, Contes- tation of	360
MASTER AND SERVANT, Responsibility of master for negligence of servant.	84	MUSHROOMS, The Law of	364
MASTER AND APPRENTICE, Breach of con- tract	299	MUTUAL INSURANCE.—See INSURANCE.	

NAME, Change of.....	136	PETITORY ACTION against tenant.....	92
NECESSARIES, Neglecting to provide wife with	82	Demurrer.....	401
NECESSARIES FOR INFANTS.....	185	PHILOSOPHY FROM THE BENCH.....	295
NEGLECTANCE, Railway Company.....	4	PLEADING, Action <i>pro socio</i>	42
Of contractor in building, causing part of wall to fall	15	Petitory action against tenant....	92
Responsibility of master for negli- gence of servant.....	84	Allegations essential in action for malicious prosecution	104
NEW YORK CODE, The.....	168	Contestation of title as simulated .	214
NEW YORK COURT OF APPEALS	1	Demurrer	294
NOTICE OF ACTION, to be given to Justice of the Peace.....	325	Allegations of petitory action.....	401
NOVATION, Giving note for debt.....	343	PORTRAIT, Exhibition of.....	274
NUISANCE, Ringing of church bells.....	342	POSSESSION, Effects purchased at judicial sale	119
Indecent exposure	408	Sale without delivery.....	182
		POWER OF ATTORNEY to sue	266
OATH of Lieut-Governor.....	372	PREScription, Right of Passage.....	52
OBLIGATION WITH TERM, Effect of Insol- vency of debtor.....	15	Action of damages against Justice of the Peace.....	325
OBLIGATION, Acceptance.....	30	Of six months under the Railway Act	150
Restoration of bonds, Condemna- tion in event of failure to deliver	413, 414	Of three months under 42-43 Vict. c. 53, s. 12	260, 263
O'CONNOR, Hon. John, Appointment of... 297		PRINCIPAL AND AGENT	29, 40
O'CONNOR, The late Charles.....	162, 216	Action by agent to recover bet....	296
OPPOSITION, Moneys in hands of Garnishee Merits of, Cannot be tried on Motion	62 338	PRISON DISCIPLINE.....	365, 381
ORE EWING CASE, Conflict between the Scotch and English Courts.....	105	PRIVILEGE OF COUNSEL.....	41, 44
OVERHEAD WIRES.....	363	PRIVILEGE OF THE CROWN.....	389
		PRIVILEGED COMMUNICATION.....	195, 316, 318, 319
PARDON, Revocation of.....	145	Publication of petition before hear- ing not privileged.....	225
PARISHES, Erection and division of	415	Private letter.....	378
PARLIAMENT, Powers of	10	PROBABLE CAUSE for capias.....	44
PARTIES TO ACTIONS, by Horace Hawes ..	145	PROCEDURE, Intervention in Injunction suit	62
PARTNERSHIP, Responsibility of members .	150	Bailiff	68
Partition of partnership property..	162	Inscription for enquête	69
Liability of partner	372	Demand against tutor	69
PASSAGE, Rights of <i>enclavé</i>	52	Mother appointed curatrix to absent son	70
PATENTS IN ENGLAND	2	Proceedings of arbitrators.....	70
PATENTEEs, Rights of	380	Petition by husband for order to see his child	78
PATERNITY, Proof of.....	149	Summons	78
PAYMENT, Place of, where creditor is dead. In fraud of creditors.....	59 274	Action by tutor.....	96
PEARL, Sir Lawrence.....	248	Fees of guardian.....	96, 102
PEERS, Age of.....	8	Injunction to prevent Corporation of Montreal from completing contract	114
PERIL OF SEA.....	15	Judgment of distribution.....	130
PERJURY, Indictment for.....	247	Appeal to Circuit Court from deci- sion of County Council	158

Correction of clerical error in register of judgments.....	168	on the License Question; Test Case	201
Opposition for monies paid on account.....	174	on the Boundary Question...202, 313, 341	
46 Vict. (Q.) cap. 46.....	208	on judgment of Privy Council in	
Motion for security for costs....209, 217		Doutre & The Queen.....	265
Costs on petition for appointment of sequestrator.....	246	RAILWAY COMPANY, liability for animal	
Indictment for perjury.....	247	found dead near track.....	4
Contestation of election of alderman.....	250	Mandamus against.....	6
Power of attorney to sue.....	266	RAILWAYS in the United States.....	16
Error in advertisement of sale....	266	RAILWAY ACT, Limitation of six months..	150
Service.....	286	RAILWAY in street.....	193, 194
Mandamus.....	286	RAILWAYS in hands of receivers.....	304
Injunction.....	292	RAILWAY, Sufficiency of railway bell—	
Provisional execution of judgment	292	Speed of trains in cities—Con-	
Appeal while case is pending in		tributory negligence.....	354
Review.....	299	Ejection of passenger from cars...	355
Interpretation of 47 Vict. (Q.) c. 8.	301	Connecting lines.....	356
Delay to call in Warrantors.....	311	Passenger's ticket.....	410
Delay for service of petition en		RAMSEY AND MORIN'S REPORTS.....	34, 41
<i>nullité de décret</i>	312	RAPE, Physician guilty of, under pretence	
Exception à la forme.....	318	of making examination of	
Art. 793, Municipal Code.....	318	patient's person.....	278
Merits of opposition cannot be tried		REGISTRATION, Renewal of, under cadastral	
on motion.....	338	system.....	131
Executor removed from office....	346	REGISTER OF JUDGMENTS, Correction of	
Liquidator of insolvent company.	359	clerical error in.....	168
Intervention in contested election.	359	REID (Judge), Suicide of.....	233
Costs of useless enquête.....	378	RÉINTÉGRATION, ACTION EN, Proof of Posses-	
Exception à la forme to capias.....	382	sion.....	276
Inscription for enquête.....	390	RELIGIOUS ORDERS in France.....	16
Action for account.....	397	REPORTS, by Messrs. Ramsay and Morin,	
<i>Faits et articles</i> not answered.....	398	Second edition of.....	34, 41
Denial of signature.....	405	REVIEW on question of costs, Useless evi-	
Execution lapsing.....	415	dence.....	378
PROFESSIONAL PRIVILEGE.....	316, 318, 319	REVOCATION OF PARDON.....	145
PROFLIXITY in documents, Punishment of..	378	REWARD, Offer of, for information.....	75
PROMISSORY NOTE, Relation of parties		ROGERS on Law of Medical men.....	403
thereto to third party.....	343	Road, Establishment of.....	63
PROVINCIAL LEGISLATURES, Powers of. See		St. LOUIS COURT HOUSE.....	89
FEDERAL AND LOCAL JURISDICTION		SAISIE-ARRÊT, Insolvency of defendant...	62
PUBLIC ROAD, Prescription.....	52	SAISIE-ARRÊT before judgment, Sufficiency	
QUEEN'S COUNSEL, Status of Colonial.....	321	of affidavit.....	109
"R" on Hodge & The Queen.....	25, 49	SAISIE-ARRÊT Conservatoire.....	110
on Russell & Lefrançois.....	57	SAISIE-GAGERIE.....	277
on the Law of Evidence.....	81	SAISIE-GAGERIE par droit de suite.....	287
on Appeals from the Circuit Court.	97	SALE of Crown Timber License.....	41, 46
		SALE FOR TAXES, Nullities.....	51
		SALE, Dissolution of, for non-payment of	
		price.....	157
		SALE OF SHIP in trust as security for ad-	
		vances.....	126

SALE , without delivery.....	182	STOCK GAMBLING	232
Unpaid vendor	367	STREAM floatable in part, Right of using improvements.....	196, 203
Of moveable, with retention of right of property, Rights of ven- dor.....	347	STREET RAILWAY	193, 194
Of right to use invention	405	STUART , Geo. Okill, The late.....	74
Promise of	407	SUBSTITUTION , Application of word "child- ren" in deed of donation.....	134
SALVATION ARMY IN CANADA	241	SUMMONS , Service of, on joint stock com- pany	61
SALVATIONISTS IN MONTREAL	257	SUPERINTENDENT OF EDUCATION , Jurisdiction	406
SALVATION ARMY , Lords Bramwell and Coleridge on	349	SUPREME COURT , Power of, to amend.....	58
SALVATION ARMY IN MONTREAL	413	SUPREME COURT REPORTS	350
SCHOOL TEACHER , Salary of, exempt from seizure	398	SURETYSHIP —Discharge of surety by deal- ings with principal.....	136
SCOTCH AND ENGLISH COURTS , Conflict be- tween	105	Composition between debtor and his creditors.....	383
SECURITY FOR COSTS , Motion for	209, 217	TAXATION of educational institutions....	26
SEDUCTION BILL	81, 108	Of Canadian Bank agency in U. S.	267
SENTENCES , Lord Coleridge on	365	TAXES , Sale of land for.....	51
SEPARATION DE CORPS , Abandonment by wife of matrimonial domicile... ..	311	TELEGRAPH COMPANY , Liability of.....	412
SEQUESTRATOR , Costs on petition for ap- pointment of	246	TENANT sued by petitory action.....	92
SERGEANTS , The old order of.....	296	TENDER OF PAYMENT , where the creditor is dead.....	59
SERVANT , Negligence of.....	84	TENDER as to one branch of demand....	110
SERVICE of writ on joint stock company..	61	TERROUX , C. A., Obituary notice.....	330
At elected domicile.....	286	TEST CASE , A.....	248
SERVITUDE —Water course.....	34	THRONE OF ENGLAND , The.....	72
Right of passage.....	52	TICHBORNE CLAIMANT	358, 380
Rights of proprietor of inferior lands.....	308	TITHES , Rights of <i>Cure</i>	382
Seigniorial Act of 1854.....	352	Division of Parishes.....	415
Collision caused by negligence....	15	TORONTO Public Library	89
SHIP , Sale of, in trust as security for advances	126	TRADE MARK , Prior use of design	43
SHORTHAND WRITERS' NOTES	185	Innocent purchaser for private use liable for infringement	72
SHERIFFS , Incorrect description of.....	328	Use of one's name.....	405
SIMULATED DEED	214	TRAVIS on the Constitutional Powers of Parliament and of the Local Legislatures.....	234
SINS OF LEGISLATORS	151	TREASURE TROVE	380
SLANDER , Compensation of damages.....	111	TRESPASS , Vendor taking back furniture not paid for	248
SOCIETY JOURNALS , Lord Chief Justice Coleridge on	137	TRUSTEES carrying on business of insol- vent, Liability of creditors for losses	210
SOLICITOR and blind hawkers.....	200	TUTOR , Demand against.....	69
SOLICITORS and THEIR COSTS.....	168	Action by.....	96
SPONGING ON PROFESSIONAL MEN	170	Wife appointed tutrix during life- time of her husband.....	120
SPRAGUE , The late Chief Justice.....	129	Appointment of.....	359
STATE PAPERS , Unauthorized publication of	348		
STATUTES , CONSOLIDATION OF.....	306		
STEPHEN , Mr. Justice, in the new law courts	256		
Remarkable article in the <i>Nine-</i> <i>teenth Century</i>	295		

UNITED STATES LEGAL JOURNALISM	82	WATER-COURSE.....	9
UNITED STATES SUPREME COURT, Labors of	216	WELDON, Mrs., The case of	15
UNIVERSAL LEGATHE, Claims pleaded in		WESTMINSTER ABBEY, Interments in.....	16
compensation to action of.....	109	WHARTON, Dr., on the case of Hodge and	
Liability for hypothec.....	408	the Queen	169, 173
USUFRUCTUARY, Debt of estate.....	84	WIFE, See HUSBAND AND WIFE	
		Sale of, in England.....	
VACATION, Extension of.....	217	Neglecting to provide with neces-	
Time for.....	266	saries.....	
Delay to call in warrantors does		Appointed tutrix in lifetime of	
not run during.....	312	husband	17
VENDOR, UNPAID, Rights of.....	157, 367	WILL, Insanity of testator, Nullity by	
VICEROYS OF INDIA	348	reason of error.....	
		Legacy given conditionally	
WAGER CONTRACTS, Decision of U.S.		Power to divide among children ..	17
Supreme Court	153	Construction of.....	46
WAITE, Chief Justice, Anecdote of.....	296	WILLIAMS, Mr. Justice, Death of.....	24
WARRANTY, Sale of Crown Timber License	41, 46	Anecdote of	28
		WITNESS, Privilege of Advocate while	
		examining	316, 318, 319

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